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UNITED STATES – COUNTERVAILING MEASURES ON SOFTWOOD LUMBER FROM CANADA

REPORT OF THE PANEL

Addendum

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

This *addendum* contains Annexes A to C to the Report of the Panel to be found in document WT/DS533/R.

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ANNEX A-1

WORKING PROCEDURES OF THE PANEL

Adopted on 23 August 2018

General

1. (1) In this proceeding, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"). In addition, the following Working Procedures apply.

   (2) The Panel reserves the right to modify these procedures, as well as any additional working procedures, as necessary, after consultation with the parties.

Confidentiality

2. (1) The deliberations of the Panel and the documents submitted to it shall be kept confidential. Members shall treat as confidential information that is submitted to the Panel which the submitting Member has designated as confidential.

   (2) Nothing in the DSU or in these Working Procedures shall preclude a party or third party from disclosing statements of its own positions to the public.

   (3) If a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public.

   (4) The parties and third parties shall treat business confidential information in accordance with the procedures set forth in the Additional Working Procedures of the Panel Concerning Business Confidential Information.

Submissions

3. (1) 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.

   (2) Each party shall also submit to the Panel, prior to the second substantive meeting of the Panel, a written rebuttal, in accordance with the timetable adopted by the Panel.

   (3) Each third party that chooses to make a written submission prior to the first substantive meeting of the Panel with the parties shall do so in accordance with the timetable adopted by the Panel.

   (4) The Panel may invite the parties or third parties to make additional submissions in the course of the proceeding, including with respect to requests for preliminary rulings in accordance with paragraph 4 below.

Preliminary rulings

4. (1) The following procedures shall apply if the responding party asks for a ruling that certain measures or claims are not properly before the Panel:

   If the United States considers that the Panel should make a ruling prior to the issuance of the Report that certain measures or claims in the panel request or Canada's first written submission are not properly before the Panel, the following procedure applies. Exceptions to this procedure shall be granted upon a showing of good cause.

a. the United States shall submit any such request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. Canada shall submit its response to the request prior to the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request.

b. The Panel may issue a preliminary ruling on the issues raised in such a preliminary ruling request before, during or after the first substantive meeting, or the Panel may defer a ruling on the issues raised by a preliminary ruling request until it issues its Report to the parties.

c. In the event that the Panel finds it appropriate to issue a preliminary ruling prior to the issuance of its Report, the Panel may provide reasons for the ruling at the time that the ruling is made, or subsequently in its Report.

d. Any request for such a preliminary ruling by the United States prior to the first meeting, and any subsequent submissions of the parties in relation thereto prior to the first meeting, shall be served on all third parties. The Panel may provide all third parties with an opportunity to provide comments on any such request, either in their submissions as provided for in the timetable or separately. Any preliminary ruling issued by the Panel prior to the first substantive meeting on whether certain measures or claims are properly before the Panel shall be communicated to all third parties.

(2) The procedure set out in paragraph (1) is without prejudice to any of the parties' right to request other types of preliminary or procedural rulings in the course of the proceeding, and to the procedures that the Panel may follow with respect to such requests.

Evidence

5. (1) Each party shall submit all evidence to the Panel no later than during the first substantive meeting, except evidence necessary for purposes of rebuttal, or evidence necessary for answers to questions or comments on answers provided by the other party. Additional exceptions may be granted upon a showing of good cause.

   (2) If any new evidence has been admitted upon a showing of good cause, the Panel shall accord the other party an appropriate period of time to comment on the new evidence submitted.

6. (1) Where the original language of an exhibit or portion thereof is not a WTO working language, the submitting party or third party shall simultaneously submit a translation of the exhibit or relevant portion into the WTO working language of the submission. The Panel may grant reasonable extensions of time for the translation of exhibits upon a showing of good cause.

   (2) Any objection as to the accuracy of a translation should be raised promptly in writing, preferably no later than the next submission or meeting (whichever occurs earlier) following the submission which contains the translation in question. Any objection shall be accompanied by a detailed explanation of the grounds for the objection and an alternative translation.

7. (1) To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute, indicating the submitting Member and the number of each exhibit on its cover page. Exhibits submitted by Canada should be numbered with CAN-001, CAN-002, etc. Exhibits submitted by the United States should be numbered USA-001, USA-002, etc. If the last exhibit in connection with the first submission was numbered CAN-005, the first exhibit in connection with the next submission thus would be numbered CAN-006.

   (2) Each party shall provide an updated list of exhibits (in Word or Excel format) together with each of its submissions, oral statements, and responses to questions.

   (3) If a party submits a document that has already been submitted as an exhibit by the other party, it should explain why it is submitting that document again.

Editorial Guide

8. In order to facilitate the work of the Panel, each party and third party is invited to make its submissions in accordance with the WTO Editorial Guide for Panel Submissions (electronic copy provided).

Questions

9. The Panel may pose questions to the parties and third parties at any time, including:

    a. Prior to any meeting, the Panel may send written questions, or a list of topics it intends to pursue in questioning orally in the course of a meeting. The Panel may ask different or additional questions at the meeting.

    b. The Panel may put questions to the parties and third parties orally in the course of a meeting, and in writing following the meeting, as provided for in paragraphs 14 and 20 below.

Substantive meetings

10. The parties shall be present at the meetings only when invited by the Panel to appear before it. The Panel may open its meetings with the parties to the public, in accordance with the Additional Working Procedures for the Panel: Open Meetings.

11. (1) Each party has the right to determine the composition of its own delegation when meeting with the Panel.

    (2) Each party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceeding and the submissions of the parties and third parties.

12. Each party shall provide to the Panel the list of members of its delegation no later than 5.00 p.m. (Geneva time) three working days preceding the first day of each meeting with the Panel.

13. A request for interpretation by any party should be made to the Panel as early as possible, preferably at the organizational stage, to allow sufficient time to ensure availability of interpreters.

14. The first substantive meeting of the Panel with the parties shall be conducted as follows:

    a. The Panel shall invite Canada to make an opening statement to present its case first. Subsequently, the Panel shall invite the United States to present its point of view. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. In the event that interpretation is needed, each party shall provide additional copies for the interpreters.

    b. Each party should avoid lengthy repetition of the arguments in its submissions. Each party is invited to limit the length of its opening statement to 60 minutes. If either party considers that it requires more time for its opening statement, it should inform the Panel and the other party at least 5 days prior to the meeting, and it should also provide, at the same time, an estimate of the length of its statement. The Panel will accord equal time to both parties for their statements.

    c. After the conclusion of the opening statements, the Panel shall give each party the opportunity to make comments or ask the other party questions.

    d. The Panel may subsequently pose questions to the parties.

    e. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with Canada presenting its statement first. Before each

party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its closing statement, if available.

f. Following the meeting:

i. Each party shall submit a final written version of its opening statement no later than 5.00 p.m. (Geneva time) on the first working day following the meeting. At the same time, each party should also submit a final written version of any prepared closing statement that it delivered at the meeting.

ii. Each party shall send in writing, within the timeframe established by the Panel prior to the end of the meeting, any questions to the other party to which it wishes to receive a response in writing.

iii. The Panel shall send in writing, within the timeframe established by the Panel prior to the end of the meeting, any questions to the parties to which it wishes to receive a response in writing.

iv. Each party shall respond in writing to the questions from the Panel, and to any questions posed by the other party, within the time-frame established by the Panel prior to the end of the meeting.

15. The second substantive meeting of the Panel with the parties shall be conducted in the same manner as the first substantive meeting with the Panel, except that the United States shall be given the opportunity to present its oral statement first. If the United States chooses not to avail itself of that right, it shall inform the Panel and the other party no later than 5.00 pm (Geneva time) three working days day prior to the meeting. In that case, Canada shall present its opening statement first, followed by the United States. The party that presented its opening statement first shall present its closing statement first.

Third party session

16. The third parties shall be present at the third-party session of the first substantive meeting, when invited by the Panel to appear before it. The Panel may open the third-party session to the public, subject to the Additional Working Procedures for the Panel: Open Meetings.

17. (1) Each third party has the right to determine the composition of its own delegation when meeting with the Panel.

(2) Each third party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceeding and the submissions of the parties and third parties.

18. A request for interpretation by any third party should be made to the Panel as early as possible, preferably upon receiving the working procedures and timetable for the proceeding, to allow sufficient time to ensure availability of interpreters.

19. (1) Each third party may present its views orally during a session of the first substantive meeting with the parties set aside for that purpose.

(2) Each third party shall indicate to the Panel whether it intends to make an oral statement during the third party session, along with the list of members of its delegation, in advance of this session and no later than 5.00 p.m. (Geneva time) three working days preceding the first day of the third party session of the meeting with the Panel.

20. The third party session shall be conducted as follows:

a. All parties and third parties may be present during the entirety of this session.

b. The Panel shall first hear the oral statements of the third parties, who shall speak in alphabetical order. Each third party making an oral statement at the third party session shall provide the Panel and other participants with a provisional written version of its statement before it takes the floor. In the event that interpretation of a third party's oral statement is needed, that third party shall provide additional copies for the interpreters.

c. Each third party should limit the length of its statement to 15 minutes, and avoid repetition of the arguments already in its submission.

d. After the third parties have made their statements, the parties shall be given the opportunity to pose questions to any third party for clarification on any matter raised in that third party's submission or statement.

e. The Panel may subsequently pose questions to any third party.

f. Following the third party session:

i. Each third party shall submit the final written version of its oral statement, no later than 5.00 p.m. (Geneva time) on the first working day following the meeting.

ii. Each party may send in writing, within the timeframe to be established by the Panel prior to the end of the meeting, any questions to a third party or parties to which it wishes to receive a response in writing.

iii. The Panel may send in writing, within the timeframe to be established by the Panel prior to the end of the meeting, any questions to a third party or parties to which it wishes to receive a response in writing.

iv. Each third party choosing to do so shall respond in writing to written questions from the Panel or a party, within a timeframe established by the Panel prior to the end of the meeting.

Descriptive part and executive summaries

21. The description of the arguments of the parties and third parties in the descriptive part of the Panel report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the case.

22. Each party shall submit an integrated executive summary. The integrated executive summary shall summarize the facts and arguments as presented to the Panel in the party's first and second written submissions, its oral statements, and where possible, its responses to questions following the first substantive meeting, and its responses to the second set of questions and comments thereon following the second substantive meeting. The timing of the submission of the integrated executive summaries shall be indicated in the timetable adopted by the Panel.

23. Each integrated executive summary shall be limited to no more than 20 pages.

24. The Panel may request the parties and third parties to provide executive summaries of facts and arguments presented in any other submissions to the Panel for which a deadline may not be specified in the timetable.

25. Each third party shall submit an integrated executive summary of its arguments as presented in its written submission and statement in accordance with the timetable adopted by the Panel. This integrated executive summary may also include a summary of responses to questions, if relevant. The executive summary to be provided by each third party shall not exceed six pages.

Interim review

26. Following issuance of the interim report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.

27. In the event that no further meeting with the Panel is requested, each party may submit written comments on the other party's written request for review, in accordance with the timetable adopted by the Panel. Such comments shall be limited to commenting on the other party's written request for review.

Interim and Final Report

28. The interim report, as well as the final report prior to its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

29. The following procedures regarding service of documents shall apply:

    a. Each party and third party shall submit all documents to the Panel by submitting them to the DS Registry (dsregistry@wto.org), in Microsoft Word format and in PDF format, either on a CD-ROM, a DVD or as an e-mail attachment.

    b. The electronic version of documents shall constitute the official version for the purposes of the record of the dispute. Should there be any discrepancy between the Microsoft Word format and PDF format of the documents, the PDF format shall constitute the final version of the party's submission.

    c. All e-mails from the parties and third parties to the Panel shall be addressed to dsregistry@wto.org, and copied to other WTO Secretariat staff whose e-mail addresses have been provided to the parties and third parties in the course of the proceeding. If a CD-ROM/DVD is provided, the submitting party or third party shall provide the DS Registry with four copies of such CD-ROM/DVD.

    d. In addition, each party and third party is invited to submit all documents through the Digital Dispute Settlement Registry (DDSR) within 24 hours following the deadline for submitting the documents to the DS Registry. If the parties or third parties have any questions or technical difficulties relating to the DDSR, they are invited to consult the DDSR User Guide (electronic copy provided) or contact the DS Registry at dsregistry@wto.org. As soon as possible and in any case no later than 10 days following a submission, each party and third party shall provide the DS Registry (Office No. 2047) with a paper copy of any document submitted to the Panel.

    e. Each party shall serve any document submitted to the Panel directly on the other party. Each party shall, in addition, serve any submissions in advance of the first substantive meeting with the Panel directly on the third parties. Each third party shall serve any document submitted to the Panel directly on the parties and on all other third parties. A party or third party may submit its documents to another party or third party in electronic format only, either on a CD-ROM, a DVD or as an e-mail attachment. Each party and third party shall confirm, in an e-mail, that copies have been served on the parties and third parties, as appropriate, at the time it provides each document to the Panel.

    f. Each party and third party shall submit its documents to the DS Registry and serve copies on the other party (and third parties where appropriate) by 5:00 p.m. (Geneva time) on the due dates established by the Panel.

    g. As a general rule, all communications from the Panel to the parties and third parties will be via e-mail.

Correction of clerical errors in submissions

30. The Panel may grant leave to a party or third party to correct clerical errors in any of its submissions (including paragraph numbering and typographical mistakes). Any such request should identify the nature of the errors to be corrected, and should be made promptly following the filing of the submission in question.

ANNEX A-2

ADDITIONAL WORKING PROCEDURES OF THE PANEL: OPEN MEETINGS

Adopted on 23 August 2018

1. The Panel will start substantive meetings with the parties (dates of substantive meetings provided for in its Timetable) with a session open to the public at which no confidential information shall be referred to or disclosed ("non-confidential session").

2. At such sessions, each party will be asked to make opening and closing statements which shall not include confidential information. After both parties have made their opening statements, each party will be given the opportunity to pose questions or make comments on the other party's statement, as described in the Working Procedures adopted by the Panel. The Panel may pose any questions or make any comments during such session. Such questions shall not include confidential information.

3. The Panel shall proceed to a closed session ("confidential session") at the request of any party, at any time, or when the Panel considers it necessary. During a confidential session, the parties may make statements or comments and pose questions that involve confidential information. The Panel may also pose questions during the confidential session. The Panel shall reserve time that may be used for a confidential session, if necessary, at each substantive meeting.

4. The Panel will start the third party session of its first substantive meeting with the parties by opening a portion of this session to the public ("non-confidential third party session"). At this portion of the third party session, no confidential information shall be referred to or disclosed. Each third party wishing to make its statement in the non-confidential third party session shall do so, but shall ensure that its statement does not include confidential information. After such third parties have made their statements, questions or comments from the parties or the Panel may be presented concerning these statements, as foreseen in the Working Procedures adopted by the Panel. Such questions or comments shall not include confidential information. To the extent that the Panel or any of the other third parties considers it necessary, the Panel shall then conclude this portion of the third party session and proceed to a third party closed session ("confidential third party session") during which other third parties shall make their statements.

5. During the confidential sessions referred to above, the following persons shall be admitted into the meeting room:

- Members of the Panel;
- Members of the delegations of the parties;
- Members of the delegations of the third parties throughout the third party session;
- WTO Secretariat staff assisting the Panel.

6. As set out below in paragraph 7, a live closed-circuit television broadcast of the Panel meeting to a separate viewing room in the WTO shall be used to allow other WTO Members, Observers, staff members, and registered members of the public to observe the non-confidential sessions.

7. The viewings will be open to officials of WTO Members, Observers and staff members of the WTO Secretariat upon presentation of their official badges. Accredited journalists and representatives of relevant non-governmental organizations (NGOs) may indicate to the Secretariat (Information and External Relations Division) their interest in attending the viewings. No later than four weeks before the substantive meetings, the WTO Secretariat will place a notice on the WTO website informing the public of the non-confidential sessions. The notice shall include a link through which members of the public can register directly with the WTO. The date(s) of the deadline for public registration will be informed to the parties as soon as it has been established.

ANNEX A-3

ADDITIONAL WORKING PROCEDURES OF THE PANEL CONCERNING BUSINESS CONFIDENTIAL INFORMATION

Adopted on 23 August 2018

1. The following procedures apply to business confidential information (BCI) submitted in the course of the present Panel proceedings.

2. For the purposes of these proceedings, BCI is defined as any information that has been designated as such by a party or a third party submitting the information to the Panel. The parties or third parties shall only designate as BCI information that is not available in the public domain, the release of which would cause serious harm to the interests of the originator(s) of the information. BCI may include information that was previously treated by the US Department of Commerce as confidential or proprietary information protected by Administrative Protective Order in the course of the countervailing duty proceeding at issue in this dispute, entitled Softwood Lumber from Canada (C-122-858). In addition, these procedures do not apply to any BCI if the entity which provided the information in the course of the aforementioned investigation has agreed in writing to make the information publicly available.

3. If a party considers it necessary to submit to the Panel BCI as defined above from an entity that submitted that information in the investigation at issue, the party shall, at the earliest possible date, obtain an authorizing letter from the entity and provide such authorizing letter to the Panel, with a copy to the other party. The authorizing letter from the entity shall authorize both Canada and the United States to submit in this dispute, in accordance with these procedures, any confidential information submitted by that entity in the course of the investigation. Each party shall, at the request of the other party, facilitate the communication to an entity in its territory of any request to provide an authorizing letter referred to above. Each party shall encourage any entity in its territory that is requested to grant the authorization referred to in this paragraph to grant such authorization. If an entity refuses to grant the authorization letter, a party may bring the situation to the attention of the Panel. The Panel shall consider what steps to take, which may include requesting information pursuant to Article 13 of the DSU. The Panel may, where necessary, draw appropriate inferences from a failure to provide information to the Panel.

4. No person may have access to BCI except a member of the Secretariat or the Panel, an employee of a party or third party, or an outside advisor to a party or third party for the purposes of this dispute. However, an outside advisor to a party or third party is not permitted access to BCI if that advisor is an officer or employee of an enterprise engaged in the production, sale, export, or import of the products that were the subject of the investigation at issue in this dispute, or an officer or employee of an association of such enterprises.

5. A person having access to BCI shall treat it as confidential, i.e. shall not disclose that information other than to persons authorized to have access to it pursuant to these procedures. Each party and third party is responsible for ensuring that its employees and/or outside advisors comply with these procedures. BCI obtained under these procedures may be used only for the purpose of providing information and argumentation in this dispute and for no other purpose. All documents and electronic storage media containing BCI shall be stored in such a manner as to prevent unauthorized access to such information. Third parties' access to BCI shall be subject to the terms of these procedures.

6. A party submitting BCI shall mark the cover and/or first page of the document containing BCI, and each page of the document, to indicate the presence of such information. The specific information in question shall be placed between double brackets, as follows: [[xx,xxx.xx]]. The first page or cover of the document shall state "Contains Business Confidential Information on pages xxxxxx", and each page of the document shall contain the notice "Contains Business Confidential Information" at the top of the page. A party submitting BCI in the form of, or as part

of, an Exhibit shall, in addition to the above, so indicate by putting "BCI" next to the exhibit number (e.g. Exhibit CAN-001 (BCI)).

7. Documents previously submitted to or created by the U.S. Department of Commerce containing information that has been designated as Confidential or Business Proprietary Information for the purpose of the underlying U.S. investigation, and marked as business proprietary information, or words to that effect (including headers and bracketing), that have also been designated as BCI in this dispute, shall be deemed to comply with the requirement set out in paragraph 6. When a party submits a document previously submitted to or created by the U.S. Department of Commerce, that party shall mark on the cover of the document "This document was submitted to or created by the U.S. Department of Commerce and retains its original confidentiality markings".

8. Where BCI is submitted in electronic format, the file name shall include the terms "Business Confidential Information" or "BCI". In addition, where applicable, the label of the storage medium shall be clearly marked with the statement "Business Confidential Information" or "BCI".

9. Where a party submits a document containing BCI to the Panel, the other party or third party referring to that BCI in its documents, including written submissions and oral statements, shall clearly identify all such information in those documents. All such documents shall be marked and treated as described in paragraph 6. In the case of an oral statement containing BCI, the party or third party making such a statement shall inform the Panel before making it that the statement will contain BCI, and the Panel will ensure that only persons authorized to have access to BCI pursuant to these procedures are present or observing the session at that time. The written versions of such oral statements submitted to the Panel shall be marked as provided for in paragraph 6.

10. If a party or third party considers that information submitted by the other party or a third party should have been designated as BCI and objects to its submission without such designation, it shall forthwith bring this objection to the attention of the Panel and the other party, and, where relevant, the third parties, together with the reasons for the objection. Similarly, if a party or third party considers that the other party or a third party designated as BCI information which should not be so designated, it shall forthwith bring this objection to the attention of the Panel and the other party, and, where relevant, the third parties, together with the reasons for the objection. The Panel shall decide whether information subject to an objection will be treated as BCI for the purposes of these proceedings on the basis of the criteria set out in paragraph 2.

11. The Panel will not disclose BCI, in its report or in any other way, to persons not authorized under these procedures to have access to BCI. The Panel may, however, make statements of conclusion drawn from such information. Before the Panel circulates its final report to the Members, the Panel will give each party an opportunity to review the report to ensure that it does not contain any BCI.

12. Submissions, exhibits, and other documents or recordings containing BCI will be included in the record forwarded to the Appellate Body in the event of an appeal of the Report of the Panel.

ANNEX A-4

INTERIM REVIEW

1 INTRODUCTION

1.1. In accordance with Article 15.3 of the DSU, this section of the Report sets out our response to the parties' requests made at the Interim Review stage. Our assessment of the parties' requests and comments is informed by the following considerations:

a. The Interim Review stage is not an opportunity for parties to reargue the case or to "introduce new legal issues and evidence or to enter into a debate with the Panel".[1]

b. The descriptions of the arguments of the parties in our Report are not meant to and do not reflect the entirety of the parties' arguments. Rather, they highlight the principal points of those arguments that we considered relevant to our resolution of the issues in dispute and addressed in our findings.[2] Finally, we note that the executive summaries of the arguments of the parties, set out in Annexes B1-B2, were prepared by the parties themselves, and reflect, or should reflect, the judgement of each party as to its main arguments.

c. A panel may develop its own reasoning in reaching its findings, provided that it does so consistently with the requirements of due process. A panel is not required to "test" its intended reasoning with the parties in advance.[3]

1.2. Where appropriate, we have modified aspects of the Report in the light of the parties' requests and comments.[4] Due to the changes implemented as a result of our review, the numbering of footnotes in the Final Report has changed from the Interim Report. The text below refers to the numbers in the Interim Report, with the numbers in the Final Report in parentheses for ease of reference, if different.

1.3. In addition to the modifications specified below, the Panel also corrected a number of typographical and other non-substantive errors throughout the Report, including some identified by the parties. The Panel is grateful for the parties' assistance in this regard.

[1] Panel Report, *India – Quantitative Restrictions*, para. 4.2.

[2] A panel has "the discretion to address explicitly in [its] reasoning only the arguments and evidence [it] deem[s] necessary to resolve a particular claim and support the reasoning [it is] required to provide". (Panel Report, *India – Agricultural Products*, para. 6.7 (referring to Appellate Body Reports, *EC – Poultry*, para. 135; and *US – COOL*, para. 414)).

[3] Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 7.177.

[4] On 15 June 2020, following the parties' comments on the Interim Report and the submissions on the other party's comments, the United States requested our leave (which we granted) to file an additional letter where it contended that the Panel had the authority under Article 15 of the DSU to review its factual and legal findings in the Interim Report, and to reconsider a legal conclusion. On 19 June 2020, Canada responded to the United States' letter contending that while Article 15.2 allows for the opportunity for a party to request that a panel review precise aspects of its factual and legal findings, in Canada's view, the ordinary meaning of the provision confirms that interim review is not a vehicle for a broad review of the entirety of a panel's legal conclusions. We note that previous panels, such as the panel in *Indonesia – Iron or Steel Products*, have taken the view that they are not required to defend their findings and conclusions during the interim review stage. (Panel Report, *Indonesia – Iron or Steel Products*, Annex A-3, para. 2.3). Panels have also considered that a request under Article 15.2 of the DSU to review precise aspects of the Interim Report may include requests to reconsider factual or legal findings. (Panel Report, *US – Tuna II (Mexico)*, para 6.3). In this particular case, we do not find it appropriate to modify our analysis or interpretation of the legal provisions at issue, as the relevant paragraphs of the Report adequately explain the Panel's reasoning.

2 THE UNITED STATES' SPECIFIC REQUESTS FOR REVIEW

2.1 Paragraph 7.20

2.1. The United States asks the Panel to replace the term "external stumpage benchmarks" with "stumpage benchmarks from other provinces" to clarify that the Panel's inquiry relates to the question of "provincial boundaries".[5]

2.2. Canada objects to the United States' request. Canada considers that it is clear from the context of the sentence, and the discussion immediately preceding and following paragraph 7.20, that the Panel intends for the phrase "external stumpage benchmarks" to refer to benchmark prices that are within the "country of provision", but emanate outside of a relevant "region" or "regional market".[6] Canada considers that this is consistent with the Panel's use of the phrases "a benchmark external to that region" and "external benchmark" in paragraph 7.31, to which, Canada notes, the United States does not similarly object.[7] Canada suggests that the Panel replace the phrase "external stumpage benchmark" with a reference to "benchmarks outside the relevant region" in the event the Panel would like to ensure that the phrase "external stumpage benchmark" is not somehow misunderstood.[8]

2.3. In light of the United States' request, we have replaced the term "external stumpage benchmarks" with the term "stumpage benchmarks from outside those regions" in paragraph 7.20.

2.2 Section 7.2 heading and paragraph 7.20 (and paragraphs 7.10, 7.12, 7.13, 7.14, 7.29, 7.30, 7.31, 7.32, 7.34, 7.43, 7.45, and 7.46)

2.4. The United States argues that the text of Article 14(d) does not refer to regional markets, nor does it impose an obligation on an investigating authority to use regional prices as a "starting point" in its benefit determination. The United States argues that the Panel's interpretation imposes a new obligation which could be understood to require regional prices to be used as the "starting point" in all cases, except where proven otherwise.[9] Based on the above, among other reasons, the United States requests the Panel to delete references to a required "starting point" in an investigating authority's benefit assessment.[10] For the same reasons, the United States requests that the Panel delete the similar references to an obligation to "first" consider regional prices, as that phrase appears in paragraphs 7.31, 7.34, and 7.49 ("first provide"; "first consider"; "to have first considered"; "obligation to first consider") and references to an obligation to consider regional prices "before" other benchmarks, as that phrase appears in paragraphs 7.20, 7.31, 7.43, and 7.48.[11]

2.5. Further, the United States contends that Canada did not argue for such a required "starting point", despite the Interim Report suggesting that it did.[12] For the United States, "it is fair to say that the USDOC ought to consider these prices, but unnecessary to say when, and in what order, it ought to have considered them".[13] The United States contends that there is no need for the Panel to prescribe what the USDOC (or an investigating authority in general) should do "first", "before", or as a "starting point" and that no basis exists for the Panel to find such an obligation.[14]

2.6. Canada contends, at the outset, that the United States' requested revision goes to the heart of the Panel's conclusions, and effectively seeks a reversal of integral elements of the Panel's analysis concerning the state of the law regarding benchmark selection under Article 14(d) and the Panel's application of the law in this dispute. Canada asserts that the

[5] United States' request for interim review, para. 4.
[6] Canada's comments on the United States' request for interim review, pp. 8-9.
[7] Canada's comments on the United States' request for interim review, pp. 8-9.
[8] Canada's comments on the United States' request for interim review, p. 9.
[9] United States' request for interim review, para. 10.
[10] United States' request for interim review, paras. 5-11.
[11] United States' request for interim review, para. 11.
[12] United States' request for interim review, para. 7.
[13] United States' request for interim review, para. 12.
[14] United States' request for interim review, para. 12.

United States' request therefore falls outside the scope of the interim review and asks the Panel to reject the United States' request on this basis alone.[15]

2.7. Canada further argues that the United States fails to explain how the Panel's legal findings and reasoning, without references to the required "starting point" in question, would still require the USDOC to examine benchmarks in the relevant regional market, other than asserting "that this was somehow required by the 'unique facts' of this case".[16] For Canada, the United States' request also fails on its merits as a starting point for assessing the adequacy of remuneration does not create a new obligation. Canada contends that the Panel's interpretation reflects nothing more than the simple logic that an investigating authority should begin its benefit analysis with a benchmark that meets the requirements of Article 14(d) by reflecting the prevailing market conditions for the government-provided good. Canada submits that the Panel's interpretation is consistent with the reasoning of the Appellate Body in *US – Softwood Lumber IV* and *US – Carbon Steel (India)*, as well as the panel in *US – Coated Paper (Indonesia)*.[17]

2.8. Canada also rejects the United States' contention that Canada did not argue that in-market prices for the government-provided good should be considered as a "starting point" for assessing adequacy of remuneration. Canada asserts that the United States focuses on Canada's infrequent use of the specific phrase "starting point", while ignoring the fact that as *a matter of substance*, Canada clearly argued that in-market prices for the government-provided good should be considered a "starting point" for assessing adequacy of remuneration.[18]

2.9. Further, Canada considers as "baseless" the United States' argument that the Panel's Interim Report imposes a "new obligation" that could be understood as requiring regional prices to be used as a "'starting point' in all cases, except where proven otherwise".[19] Canada asserts that the Panel explained that a regional benchmark would only be required as a starting point for assessing adequacy of remuneration 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".[20] Canada further points to other places in the Interim Report where the Panel made similar observations.[21]

2.10. We consider that paragraphs 7.21-7.30 of our Report set out adequate reasoning to support the legal interpretation with which the United States takes issue. We therefore decline the United States' request. As regards the United States' contention that Canada did not argue for the required "starting point" in question in an investigating authority's benefit assessment, we note that contrary to the United States' view, Canada does expressly make that argument at paragraph 300 of Canada's first written submission. Further, we accept Canada's comment that the same argument can be inferred from the relevant paragraphs[22] of Canada's first written submission. We therefore reject the United States' contentions in this regard.

2.3 Paragraphs 7.23, 7.27, 7.28, 7.30, 7.31, 7.32, and 7.33

2.11. The United States requests that the Panel delete the phrase "results from" in the paragraphs in question and replace it with the language of Article 14(d), e.g. "[a] price that ~~results from~~ **relates to** the prevailing market conditions".[23] According to the United States, the Interim Report uses the

[15] Canada's comments on the United States' request for interim review, pp. 2-4 (referring to Panel Reports, *Indonesia – Iron or Steel Products*, Annex A-3, para. 2.4; *Japan – DRAMs (Korea)*, para. 6.2; and *US – Poultry (China)*, para. 6.32).
[16] Canada's comments on the United States' request for interim review, p. 4.
[17] Canada's comments on the United States' request for interim review, pp. 4-5 (referring to 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).
[18] Canada's comments on the United States' request for interim review, p. 5 (referring to Canada's first written submission, paras. 45-50, 51-54, and 59).
[19] Canada's comments on the United States' request for interim review, p. 5 (referring to the United States' request for interim review, para. 10).
[20] Canada's comments on the United States' request for interim review, p. 5 (quoting Interim Report, para. 7.30 (emphasis added)).
[21] Canada's comments on the United States' request for interim review, p. 5 (referring to Interim Report, paras. 7.31 and 7.34).
[22] Canada's first written submission, paras. 45-50, 51-54, and 59.
[23] United States' request for interim review, para. 13. (emphasis original)

phrase "results from" to describe a requirement to use as a benchmark "[a] price that results from the prevailing market conditions" while the text of Article 14(d) states that "[t]he adequacy of remuneration shall be determined in relation to the prevailing market conditions". The United States argues that the use of this phrase imposes an obligation that is not found in the text of Article 14(d) of the SCM Agreement.

2.12. Canada proposes that the Panel reject the United States' request as an overly broad request for review of the Panel's legal reasoning, which falls outside the scope of interim review.[24] Further, Canada submits that paragraph 7.23 of the Report demonstrates that the Panel has not replaced the legal obligation that a benchmark must "relate to" prevailing market conditions with the phrase "results from". Rather, the Panel indicated that prices that, as a factual matter, result or emanate from the market for the government-provided good will inherently meet the legal threshold of *relating to* prevailing market conditions in Article 14(d).[25] Canada contends that the Panel also explained that an investigating authority is not under an obligation to rely on prices resulting or emanating from the market for the government-provided good in all circumstances. The Panel acknowledged that an investigating authority may have to resort to prices outside of the relevant market, or even another country, that are "carefully selected and adjusted" so that they reflect or relate to "the prevailing market conditions for the government-provided good".[26]

2.13. We consider that paragraphs 7.23, 7.27, and 7.30 of the Report provide ample explanation of the reasons why we consider it appropriate to include in our Report the relevant considerations with which the United States takes issue. We therefore do not believe it is necessary to amend our findings and we decline the United States' request.

2.4 Paragraphs 7.21, 7.22, 7.23, 7.27 (and footnote 65 (footnote 67 of the Final Report)), 7.31, and 7.32

2.14. The United States requests that the Panel revise and remove from the Final Report the concept that "the prevailing market conditions for the government-provided good are different from the prevailing market conditions for the same or similar goods" in paragraphs 7.27, 7.31, and 7.32, and other relevant paragraphs that rely on this reasoning.[27] The United States contends that the Panel's reliance on the concept of "*the good that the government actually sold*" reads into Article 14(d) a limitation that is not found in the text, i.e. that the prevailing market conditions for the good in question refers to the particular terms and conditions of the government transaction and not the prevailing market conditions for the good in general. For the United States, in doing so, the Panel artificially creates two sets of what it calls "prevailing market conditions" and thus frustrates the possibility of a proper benchmark comparison.[28] For the United States, "the good in question is not just the particular item the government provided, but also that good writ large".[29] The United States contends that the Panel applies its own phraseology in a way that precludes a benchmark comparison and instead requires a reconstruction of the government sale itself, including all of its terms and conditions, up to the point where no difference can exist between the benchmark and the allegedly subsidized transaction.[30] The United States also takes issue with that the Panel's reference in paragraph 7.22 to the panel finding in *US – Anti Dumping and Countervailing Duties (China)* that the "benchmark must reflect the 'factual situation' found to exist in respect of the government provided good", arguing that the panel in that case made that finding in the context of whether to grant credits for transactions that did not confer a benefit.[31]

2.15. Canada proposes that the Panel reject United States' request, as it calls for broad revisions to the legal interpretation developed by the Panel and does not properly fall within the scope of interim review.[32] Further, Canada contends that the United States' request is based on a misinterpretation of the Panel's reasoning.[33] Canada argues that contrary to the

[24] Canada's comments on the United States' request for interim review, pp. 3 and 6.
[25] Canada's comments on the United States' request for interim review, p. 6.
[26] Canada's comments on the United States' request for interim review, p. 6 (referring to Interim Report, para. 7.27).
[27] United States' request for interim review, para. 26.
[28] United States' request for interim review, para. 15. (emphasis original)
[29] United States' request for interim review, para. 16.
[30] United States' request for interim review, para. 16.
[31] United States' request for interim review, para. 19.
[32] Canada's comments on the United States' request for interim review, pp. 3 and 7.
[33] Canada's comments on the United States' request for interim review, p. 7.

United States' contention, nowhere does the Panel equate prevailing market conditions for the government-provided good with specific terms and conditions associated with the provision of that good. Canada asserts that the Panel instead found that "prevailing market conditions" refer to the market conditions that prevail in the market into which the government good is provided.[34]

2.16. Canada further contends that the United States' request rests on the false premise that a government-provided good will *always* be provided into a single national market with prevailing market conditions that are uniform across the country.[35] Canada argues that the Panel, however, rejected that argument in paragraphs 7.25, 7.26, and 7.27, explaining that, while it may *sometimes* be the case that there is a single, national set of prevailing market conditions for a government-provided good in different parts of a country of provision, it is certainly not always the case.[36] Canada avers that the Panel has neither "draw[n] a distinction between the 'prevailing market conditions' solely on the question of whether the good is provided by the government or not", nor "assumed that the government transaction has its own unique and transaction-specific 'prevailing market conditions'".[37] Canada submits that instead the different sets of "prevailing market conditions" arising out of the government provision of a good refer to a situation where "the prevailing market conditions for the relevant good changed from one region to another within the country of provision".[38]

2.17. Canada also disagrees with the United States' argument that the Panel's reliance on the "'factual situation' found to exist in respect of the government-provided good" is "inapposite". For Canada, the statement that the panel in *US – Anti-Dumping and Countervailing Duties (China)* made, and on which this Panel relies, went to the "the basic requirement of Article 14(d), as expressed by the phrase 'prevailing market conditions for the good … in question".[39]

2.18. We consider that paragraphs 7.24-7.32 of our Report provide ample explanation of the relevant considerations with which the United States takes issue. We therefore do not believe it is necessary to amend our findings and decline the United States' request. Nonetheless, to provide further clarity we have added a footnote to paragraph 7.22 of the Report to address the United States' concerns. This footnote appears as footnote 61 in the Final Report.

2.5 Paragraphs 7.40, 7.41 (and footnote 106), 7.42, and 7.44

2.19. The United States takes issue with the Panel's consideration that the USDOC, by finding that the unadjusted Nova Scotia benchmark prices reasonably reflected the prevailing market conditions in each of Alberta, Ontario, and Québec, therefore, also necessarily found – albeit *implicitly* – that the prevailing market conditions in Alberta, Ontario, and Québec, as against each other, were similar.[40] The United States asserts that the USDOC was tasked with considering benchmarks for each of the stumpage programs at issue and, in doing so, the USDOC compared each province to the Nova Scotia benchmark. For the United States, this is different than comparing the other individual provinces to each other. The United States therefore asks the Panel to remove all references to an "implicit" finding by the USDOC from the Final Report to avoid factual inaccuracy.[41]

2.20. Canada does not object to the removal of the second, third, and fifth sentence of paragraph 7.41, and its corresponding footnotes, 106 and 108 of the Interim Report. While Canada notes that the Panel's logic reflects the United States' arguments during the course of the proceedings, Canada considers that removing references to the USDOC's "implicit" finding, as described, would not disturb the critical aspects of the Panel's finding in the relevant paragraphs, in particular, pertaining to the USDOC's failure to reasonably and adequately address whether each of

[34] Canada's comments on the United States' request for interim review, p. 7 (referring to Interim Report, para. 7.30).
[35] Canada's comments on the United States' request for interim review, p. 7.
[36] Canada's comments on the United States' request for interim review, pp. 7-8.
[37] Canada's comments on the United States' request for interim review, p. 8 (referring to the United States' request for review of the Interim Report, paras. 20 and 24).
[38] Canada's comments on the United States' request for interim review, p. 8 (referring to Interim Report, para. 7.25).
[39] Canada's comments on the United States' request for interim review, p. 8 (referring to Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 11.56).
[40] United States' request for interim review, para. 28.
[41] United States' request for interim review, para. 29.

Alberta, Ontario, and Québec had different prevailing market conditions with respect to Nova Scotia, despite the ample evidence before it demonstrating their differences.[42]

2.21. Canada suggests that should the Panel remove the aforementioned references, it should also remove the reference to the "implicit finding" in question in footnote 110 at paragraph 7.42 of the Interim Report. Canada submits that it is well within the Panel's standard of review, as paragraphs 7.50 and 7.60 of the Interim Report set out, to critically examine all relevant evidence before the investigating authority in order to determine whether an investigating authority's conclusions were reasoned and adequate, and internally consistent, in light of the evidence before it.[43]

2.22. We note that our reasoning with which the United States takes issue, reflects the United States' own arguments[44] during the course of the proceedings that "the USDOC has demonstrated … that the prevailing market conditions for the good in question were not categorically different between provinces".[45] However, bearing in mind that Canada does not object to the United States' request to remove all references to an "implicit" finding by the USDOC from the Report, we have decided to accommodate that request and have accordingly modified the relevant paragraphs.

2.23. The United States further argues that paragraph 7.42 incorrectly describes as "*ex post*" the explanations of the USDOC's investigation that the United States provided in this proceeding. According to the United States, in doing so, the Panel ascribes to the United States an argument it did not make.[46] In particular, the United States contends that it did not argue that "there may be no appropriate basis upon which to delineate between conditions in one region and another", but merely summarized its understanding of Canada's arguments regarding "regional markets" and their implications in the context of this dispute. The United States further avers that because it did not make the argument attributed to it by the Panel, the United States could not have been attempting to provide any *ex post* rationalization. The United States proposes that the Panel delete from paragraph 7.42 the reference to the argument in question as constituting *ex post* rationalization.[47]

2.24. Canada considers that removing the reference to the United States' arguments in question would not disturb the critical aspects of the Panel's finding in paragraph 7.42. Therefore, Canada does not object to the removal of the last sentence of 7.42.[48]

2.25. We have decided to accommodate the United States' request with respect to paragraph 7.42, bearing in mind that Canada does not object to the request, and have modified the paragraph accordingly.

2.26. The United States requests that the Panel delete paragraph 7.44 in its entirety.[49] The United States asserts that the USDOC examined voluminous facts about specific provinces and the conditions within those provinces in the course of its inquiry, but that did not then obligate the USDOC to make its assessment on the basis of province-specific differences, as requested by individual Canadian provinces or other interested parties in the underlying investigation.[50] For the United States, paragraph 7.44 of the Interim Report does not reflect an accurate characterization of the USDOC's inquiry in its proper context.[51]

2.27. Canada asks the Panel to reject the United States' request to delete paragraph 7.44, on the basis that it is an attempt to relitigate points that were made during the proceedings and raises questions about the merits of the Panel's analysis and findings.[52] Canada submits that, as paragraph 7.44 indicates, the USDOC's own questionnaires and determinations demonstrate how the USDOC itself treated the provinces in question as separate markets. For Canada, the

[42] Canada's comments on the United States' request for interim review, pp. 9-10.
[43] Canada's comments on the United States' request for interim review, p. 10.
[44] See fn 110 of the Interim Report.
[45] United States' comments on Canada's response to Panel question No. 161, para. 41
[46] United States' request for interim review, para. 30.
[47] United States' request for interim review, para. 31.
[48] Canada's comments on the United States' request for interim review, p. 10.
[49] United States' request for interim review, para. 32.
[50] United States' request for interim review, para. 32.
[51] United States' request for interim review, para. 32.
[52] Canada's comments on the United States' request for interim review, p. 10.

United States' contention that this incorrectly describes the USDOC's own approach is without merit.[53] Canada, however, does not object to the removal of the reference to an "implicit finding" in the second last sentence of paragraph 7.44, should the Panel be inclined to accept the United States' request on this particular point.[54]

2.28. We consider that the relevant paragraph does not, as the United States asserts, suggest that the USDOC's examination of voluminous facts about specific provinces and the conditions within those provinces in the course of its inquiry "obligate[d] the USDOC to make its assessment on the basis of province-specific differences". Instead, the Panel notes that "[i]n 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", it finds it perplexing that the USDOC failed to adequately explain the finding based on that evidence. We consider that paragraph 7.44 adequately sets out the basis for this conclusion. We therefore decline the United States' request. Further, we have removed references to the "implicit finding" in the last sentence of paragraph 7.44 in accordance with Canada's suggestion.

2.6 Paragraph 7.24, footnote 63 (footnote 65 of the Final Report)

2.29. The United States proposes that the Panel delete this footnote in its entirety as it inaccurately presents the United States' argument.[55]

2.30. Canada asks the Panel to reject the United States' request, as it considers that the United States mischaracterizes the content of the footnote, which concerns the logical implications of the United States' arguments in this dispute.[56] Canada submits that the phrase "based on the United States' own argument" in the footnote indicates that the Panel intends to explain the logical implications of the United States' response to Panel question No. 154, which are at odds with the USDOC's findings in the final determination.[57] Canada further submits that should the Panel wish to consider a clarification to this footnote, it could replace the relevant text with: "[t]herefore, based on the United States' own logic …".[58]

2.31. We decline the United States' request, considering that the footnote describes the United States' argument as it was set out at paragraph 6 of the United States' response to Panel question No. 154. We have, however, in light of Canada's suggestion, slightly modified the language of the footnote.

2.7 Paragraph 7.24

2.32. The United States requests that the Panel make certain revisions to this paragraph to better reflect the United States' argument. In particular, the United States requests that the Panel delete the words "*anywhere* in" from the first sentence of this paragraph contending that the Panel's own emphasis on the word "*anywhere* in the country of provision" does not reflect the United States' argument.[59]

2.33. Canada asks the Panel to reject the United States' request, considering that the Panel has accurately summarized the United States' arguments in paragraph 7.24.[60]

2.34. We decline the United States' request to delete the words "*anywhere* in" from the first sentence of this paragraph, considering that in response to the Panel's question regarding whether a market-determined benchmark selected from *anywhere* in the country of provision would satisfy the requirements of Article 14(d), the United States itself replied in the affirmative.[61, 62] However, in

[53] Canada's comments on the United States' request for interim review, p. 10.
[54] Canada's comments on the United States' request for interim review, pp. 10-11.
[55] United States' request for interim review, paras. 33-34.
[56] Canada's comments on the United States' request for interim review, p. 11.
[57] Canada's comments on the United States' request for interim review, p. 11.
[58] Canada's comments on the United States' request for interim review, p. 11.
[59] United States' request for interim review, para. 35. (emphasis added by the United States)
[60] Canada's comments on the United States' request for interim review, p. 11.
[61] United States' response to Panel question No. 154, para. 11.
[62] The United States further goes on to state in response to the same question from the Panel that "the fact that a price is found within the country of provision does not speak to other aspects of comparability,

light of the United States' request, we have added language to the sentence in question indicating that the United States makes that argument in response to a question from the Panel, and we have added the appropriate reference.

2.35. The United States further asks the Panel to add to this paragraph of the Report certain language provided at paragraph 12 of the United States' response to Panel question No. 154. The United States asserts that it explained at the substantive meetings that the particular location within the country of provision is not the determinative factor, but rather that the comparability of the good in question (including the prevailing market conditions) determines whether an appropriate comparison can be made.[63]

2.36. Canada contends that the United States' proposed addition is unnecessary. Canada submits that in paragraph 7.24 of the Interim Report, the Panel does not suggest that the United States has argued that the particular location within the country of provision is the determinative factor for benchmark selection. Canada submits that, to the contrary, the Panel points to conditions – "as long as" – that reflect what the United States suggests the Panel add to this paragraph.[64]

2.37. We find that the language that the United States asks us to add bears no specific reference to comparability of the good in question "*including the prevailing market conditions*" as the United States suggests in its request.[65] Insofar as the language that the United States asks us to add refers to "aspects of comparability", such as whether the potential benchmark is a price for the good in question, or whether the potential benchmark is a market-determined price, paragraph 7.24 of the Report already reflects those aspects in its description of the United States' argument. We therefore do not consider it necessary to include the language the United States asks us to add and accordingly decline the United States' request.

2.8 Paragraphs 7.28 and 7.30

2.38. The United States requests that paragraphs 7.28 and 7.30 be modified to remove references to "the preferred way" or "the preferred approach" to the benchmark comparison under Article 14(d) of the SCM Agreement. The United States contends that the text of Article 14 provides no basis for making statements in the abstract and without attribution that refer to "the preferred way".[66]

2.39. Canada proposes that the Panel reject the United States' request, as an overly broad request for review of the Panel's legal reasoning that falls outside the proper scope of interim review.[67] Canada argues that in referring to "the preferred way" or "the preferred approach" under Article 14(d), the Panel simply indicates that an analysis determining the adequacy of remuneration should be carried out by considering in-market prices first before using external benchmarks. Canada asks the Panel to reject the United States' request for the same reasons Canada provided in its comments concerning paragraphs 5 to 12 of the United States' request for interim review.[68]

2.40. We consider that paragraphs 7.21-7.30 of our Report set out adequate reasoning to support the legal interpretation with which the United States takes issue. We therefore decline the United States' request.

2.9 Paragraph 7.33 and footnote 76 (footnote 78 of the Final Report)

2.41. The United States asserts that the Panel has incorrectly characterized the United States' position in paragraph 7.33 and footnote 76, and requests that the Panel remove that characterization from the Final Report.[69] The United States contends, in particular, that this paragraph and footnote incorrectly suggest that the United States considered Canada's allegedly

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e.g., whether the potential benchmark is a price for the good in question or, e.g., whether the potential benchmark is a market determined price". (United States' response to Panel question No. 154, para. 12).

[63] United States' request for interim review, para. 35.
[64] Canada's comments on the United States' request for interim review, p. 12.
[65] United States' request for interim review, para. 35.
[66] United States' request for interim review, para. 36.
[67] Canada's comments on the United States' request for interim review, p. 3.
[68] Canada's comments on the United States' request for interim review, p. 8.
[69] United States' request for interim review, para. 38.

"erroneous" characterizations of Articles 19.3 and 19.4 of the SCM Agreement "unobjectionable", when, in fact, the United States expressed its objection at great length.[70] The United States also contends that the quotation of "unobjectionable" appears to be pulled from an unrelated section of the United States' first written submission.[71]

2.42. Canada asks the Panel to reject the United States' request. Canada contends that footnote 76 of the Interim Report explains that the United States has indicated that it agrees with the overarching principle that an investigating authority's determination of the amount of a subsidy should be accurate.[72] Canada submits that the United States acknowledged this principle with respect to Canada's arguments concerning whether the setting to zero of certain comparisons during the benefit calculation was inconsistent with Articles 19.3 and 19.4 of the SCM Agreement and Article VI:3 of the GATT.[73] Canada suggests, however, that if the Panel were inclined to address the United States' comments, the Panel could revise the footnote to indicate that: "the United States ~~noted~~ **has acknowledged in the context of another argument** that Canada's view that '[t]he SCM Agreement requires that an investigating authority accurately determine the amount of a subsidy' is 'unobjectionable'".[74]

2.43. We find the United States' request unpersuasive. We note that at paragraph 495 of its first written submission the United States clearly states that Canada's view that "[t]he SCM Agreement requires that an investigating authority accurately determine the amount of a subsidy" is "unobjectionable".[75] The paragraphs of its first written submission to which the United States refers when it argues that it expressed its objection to Canada's characterization of Articles 19.3 and 19.4 of the SCM Agreement "at great length", do not pertain specifically to Canada's view that "[t]he SCM Agreement requires that an investigating authority accurately determine the amount of a subsidy". Instead, they pertain to the question of whether Articles 19.3 and 19.4 of the SCM Agreement impose an obligation on Members to conduct an aggregate analysis or require Members to provide credit in the benefit calculation when a government provides goods for adequate remuneration.[76] In particular, through these paragraphs of its first written submission, the United States objects specifically to the view that "the USDOC was obligated to apply a particular approach to the benefit calculation … namely aggregating comparison results across different financial contributions and, in reality, providing 'credits' where certain financial contributions were found not to confer a benefit".[77] For the foregoing reasons, we decline the United States' request. However, in light of Canada's suggestion, we have slightly modified the language of the footnote in question.

2.10 Paragraphs 7.38 and 7.39

2.44. The United States notes that several sentences in these paragraphs give no indication that the Panel is summarizing Canada's view, rather than expressing the Panel's own assessment. The United States suggests that the Panel add the phrase "Canada argues that ..." in the relevant sentences in these paragraphs for the Final Report.[78] Canada asks the Panel to reject the United States' request. For Canada, the United States' request seeks to mischaracterize the Panel's review of the record evidence as arguments submitted by Canada.[79]

2.45. We have addressed the United States' request by modifying certain sentences in these paragraphs, and have also added a footnote to paragraph 7.38, for further clarity. This footnote appears as footnote 88 in the Final Report.

[70] United States' request for interim review, para. 37.
[71] United States' request for interim review, para. 37.
[72] Canada's comments on the United States' request for interim review, pp. 12-13.
[73] Canada's comments on the United States' request for interim review, p. 13.
[74] Canada's comments on the United States' request for interim review, p. 13. (emphasis added by Canada)
[75] United States' first written submission, para. 495.
[76] United States' first written submission, paras. 16-18 and 496-503.
[77] United States' first written submission, para. 495.
[78] United States' request for interim review, para. 39.
[79] Canada's comments on the United States' request for interim review, p. 13.

2.11 Paragraphs 7.109 (and footnote 231 (footnote 230 of the Final Report)) and 7.256 (and footnote 540)

2.46. The United States asks the Panel to add the words "in certain circumstances" to these two footnotes which use identical language and summarize the USDOC's regulatory hierarchy for selecting benchmarks.[80] In particular, the United States requests that, in order to present the facts more accurately, the Panel modify the footnotes to indicate 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.[81]

2.47. Canada does not comment on the United States' request.

2.48. We have accepted the United States' request by making the modifications suggested by the United States to these footnotes.

2.12 Paragraph 7.123

2.49. The United States requests the Panel to change the last sentence of this paragraph to the following: "[o]n such grounds, the USDOC determined BCTS auction prices were not market determined".[82] Canada does not comment on this request.

2.50. We have accepted the United States' request.

2.13 Paragraph 7.201

2.51. The United States requests the Panel to modify the first sentence of paragraph 7.201 to indicate that the inability of sawmills to process certain logs is not the exclusive reason why sawmills in Quebec transfer allocations of Crown timber.[83] The United States proposes the following changes to the first sentence of paragraph 7.201: "[w]e further consider that the USDOC did not explain how the transfer of sawmills' allocation of Crown timber to other sawmills specifically ~~*because*~~ *in instances when they cannot process certain logs* would reduce those sawmills' total need to acquire timber from the auction or non Crown sources".[84]

2.52. Canada does not object to the United States' request.

2.53. We have decided to accommodate the United States' request by making the modifications suggested by the United States to this paragraph.

2.14 Paragraph 7.371

2.54. The United States requests the Panel to designate certain information in the third and fourth sentences of this paragraph as BCI. The United States also requests the Panel to make a citation correction in footnote 759 (footnote 759 of the Final Report).[85] Canada does not comment on these requests.

2.55. We have accepted the United States' request regarding BCI designation. However, we have rejected the United States' request regarding the citation correction, as we consider that no such correction is needed.

[80] United States' request for interim review, para. 40.
[81] United States' request for interim review, para. 40.
[82] United States' request for interim review, para. 42.
[83] United States' request for interim review, para. 43.
[84] United States' request for interim review, para. 43. (emphasis added by the United States)
[85] United States' request for interim review, paras. 45-46.

2.15 Paragraph 7.558

2.56. The United States requests that the term "country of origin" at the end of the first sentence of the paragraph be changed to "country of provision" to reflect the language in Article 14(d) of the SCM Agreement.[86] Canada does not comment on this request.

2.57. We have accepted the United States' request.

2.16 Paragraph 7.572

2.58. The United States asserts that this paragraph does not reflect the United States' response to one of Canada's arguments that the paragraph summarizes. The United States requests the Panel to include the United States' response in this paragraph.[87] Based on its view that the Panel's analysis does not engage with the relevant United States' argument, the United States also requests the Panel to reconsider its conclusion and to provide additional explanation of the underlying logic in light of that argument.[88] Canada asserts that the Panel ought to reject the United States' request, as the Panel explicitly rejected a basic assumption underlying the relevant argument of the United States in paragraph 7.571 of the Report. Canada also asserts that paragraph 7.573 of the Report addressed and rejected the United States' argument.[89]

2.59. We reject the United States' request as we consider that the argument referred to by the United States is not relevant to our resolution of Canada's claim. As noted in paragraph 1.1 b above, the descriptions of the arguments of the parties in our Report are not meant to, and do not reflect, the entirety of the parties' arguments, but only to highlight the principal points of those arguments. We further note that the United States' argument at issue does not address the reason due to which we upheld Canada's argument in paragraph 7.573 of the Report, i.e. "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 our view, nothing in the argument referred to by the United States countervails our reasoning quoted above. We therefore do not consider it necessary to modify any aspect of our Report on account of this argument of the United States.

2.17 Paragraph 7.615

2.60. The United States requests the Panel to modify the second sentence of this paragraph to accurately reflect the partial cutting requirements.[90] Canada responds to the United States' request with a request to the Panel to make another modification to the sentence so as to indicate the partial cut prescription is mandated by Québec.[91]

2.61. We have accepted the modifications to the second sentence requested by the United States as well as Canada.

3 CANADA'S SPECIFIC REQUESTS FOR REVIEW

3.1 Paragraphs 7.21-7.22

3.1. Canada notes that it agrees with the Panel's interpretation of the ordinary meaning of the English version of Article 14(d) of the SCM Agreement. Canada invites the Panel to consider whether it should also refer to the Spanish and French versions of Article 14(d) in a footnote.[92]

3.2. The United States does not comment on Canada's request.

[86] United States' request for interim review, para. 47.
[87] United States' request for interim review, para. 48.
[88] United States' request for interim review, para. 48.
[89] Canada's comments on the United States' request for interim review, p. 14.
[90] United States' request for interim review, para. 49.
[91] Canada's comments on the United States' request for interim review, p. 15.
[92] Canada's request for interim review, p. 1.

3.3. We consider that the Panel's interpretation of Article 14(d) in the relevant context of this dispute is sufficiently supported by reasoning set out in the Report, and do not consider it necessary to also refer to the Spanish and French versions of Article 14(d) in that regard. We therefore decline Canada's request.

3.2 Paragraph 7.27, footnote 67 (footnote 69 of the Final Report)

3.4. Noting that the Panel refers in this footnote to the reasoning of a panellist in *Canada Renewable Energy / Canada – Feed-in-Tariff Program*, Canada suggests that the Panel consider adding a parallel citation to the Appellate Body's decision in the same case which, according to Canada, reaches a similar conclusion concerning the interpretation of Article 14(d).[93]

3.5. The United States objects to Canada's request, arguing that the conclusion in the Appellate Body report was concerned with the application of Article 14(d) to the provision of electricity – the particular good at issue in that dispute – and was not concerned with the interpretation of Article 14(d) itself. Further, the United States considers that Canada has not provided a justification for its request.[94]

3.6. We consider that the Panel's interpretation of Article 14(d) in the relevant context of this dispute is sufficiently supported by reasoning set out in the Report, and do not consider it necessary to add the citation to the Appellate Body's decision as Canada suggests we do. We therefore decline Canada's request.

3.3 Paragraph 7.38, footnote 85 (footnote 87 of the Final Report)

3.7. Canada asks the Panel to consider including a parallel citation to the following source, which for Canada, also addressed differences in prevailing market conditions between the relevant provinces: "Kalt Report on Crown timber, Exhibit CAN-14, pp. 9 and 50-54".[95]

3.8. The United States asks the Panel to reject Canada's request. The United States argues that Canada's proposed modification would appear only to broaden the Panel's finding without justification for doing so, and Canada has not demonstrated that such a change is necessary.[96]

3.9. We consider it pertinent to include in this footnote the citation that Canada asks us to add. We have therefore decided to accommodate Canada's request with respect to this footnote and have modified the footnote accordingly.

3.4 Paragraph 7.68

3.10. Canada suggests that the Panel consider replacing "only" with "simply" in the last sentence of this paragraph.[97]

3.11. The United States does not comment on Canada's request.

3.12. We have accepted Canada's request and have made the linguistic change sought.

3.5 Paragraph 7.69

3.13. Canada suggests replacing "only" with "simply" in the first sentence of this paragraph.[98]

3.14. The United States does not comment on Canada's request.

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[93] Canada's request for interim review, pp. 1-2 (referring to Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.239 and fn 746).
[94] United States' comments on Canada's request for interim review, para. 3.
[95] Canada's request for interim review, p. 2.
[96] United States' comments on Canada's request for interim review, para. 4.
[97] Canada's request for interim review, p. 2.
[98] Canada's request for interim review, p. 2.

3.15. We have accepted Canada's request and have made the linguistic change sought.

3.6 Paragraph 7.73

3.16. For greater clarity, Canada suggests that the Panel make the following revision in the final sentence of this paragraph: "… and the **share of** ~~export of~~ softwood lumber **exports** from Ontario was too small to have affected the **U.S.** price of softwood lumber".[99]

3.17. The United States does not comment on Canada's request.

3.18. We have decided to accommodate Canada's request with respect to this paragraph and have modified the paragraph accordingly.

3.7 Paragraph 7.117, footnote 248 (footnote 247 of the Final Report)

3.19. Canada requests that the Panel include an additional citation to the final determination to this footnote.[100] The United States does not respond to this request.

3.20. We have accepted Canada's request.

3.8 Paragraph 7.117

3.21. Canada requests that the Panel add certain language to the fifth sentence of this paragraph to clearly indicate that the Panel is describing the USDOC's finding in this sentence.[101] The United States does not respond to this request.

3.22. We have accepted Canada's request.

3.9 Paragraph 7.118

3.23. Canada requests that the Panel modify the third and fourth sentences of this paragraph to indicate that the Panel is describing the USDOC's reasoning in the final determination in these sentences.[102] The United States does not respond to this request.

3.24. We have accepted Canada's request.

3.10 Paragraph 7.120

3.25. Canada requests that the Panel modify the second sentence of this paragraph to more accurately reflect Canada's argument.[103] The United States does not respond to this request.

3.26. We have accepted Canada's request.

3.11 Paragraph 7.136, footnote 300 (footnote 299 of the Final Report)

3.27. Canada requests that the Panel observe in this footnote that the United States' argument described in the footnote constitutes *ex post* reasoning that did not appear in the preliminary or final determinations.[104] The United States asserts that there is no basis for the Panel to make the requested modification to footnote 300 as Canada has not offered any explanation supporting its request.[105]

[99] Canada's request for interim review, p. 2. (emphasis added by Canada)
[100] Canada's request for interim review, p. 2.
[101] Canada's request for interim review, p. 3.
[102] Canada's request for interim review, p. 3.
[103] Canada's request for interim review, p. 3.
[104] Canada's request for interim review, p. 3.
[105] United States' comments on Canada's request for interim review, para. 6.

3.28. We have accepted Canada's request, as Canada has explained, and the United States does not contest, that the United States' argument described in the footnote did not appear in the USDOC's determinations.

3.12 Paragraph 7.147, footnote 325 (footnote 324 of the Final Report)

3.29. Canada requests that the Panel replace the existing citation to Canada's submission in this footnote with certain alternative citations to Canada's submissions.[106] The United States does not comment on this request.

3.30. We have accepted Canada's request.

3.13 Paragraph 7.158, footnote 355 (footnote 354 of the Final Report)

3.31. Canada requests the Panel to add citations to paragraphs 211 and 212 of Canada's first written submission in this footnote.[107] The United States does not comment on this request.

3.32. We have accepted Canada's request.

3.14 Paragraph 7.162, footnote 364 (footnote 363 of the Final Report)

3.33. Canada requests that the Panel modify the citation to paragraph 44 of the Larry Gardner affidavit, (Exhibit CAN-31 (BCI)) in this footnote to refer more generally to paragraphs 43 to 46. Canada states that these paragraphs refer to harvesting and transportation costs of logs in the British Columbia interior more generally.[108] The United States does not comment on Canada's request.

3.34. We have modified the citation in footnote 364 of the Report to refer to paragraphs 43 to 45 of the relevant exhibit, but not paragraph 46. Paragraph 46 pertains to costs associated with beetle-killed timber and is outside the scope of the sentence in paragraph 7.162 of the Report to which the footnote in question is attached.

3.15 Paragraphs 7.162-7.163, footnotes 363, 364 and 369 (footnotes 362, 363, and 368 of the Final Report); paragraph 7.173, footnote 389 (footnote 388 of the Final Report); and paragraphs 7.175-7.176, footnotes 395 and 404 (footnotes 394 and 403 of the Final Report)

3.35. Canada requests the Panel to modify the nomenclature of Exhibit CAN-16 to the "Kalt Report on LEPs" and of Exhibit-CAN-90 to the "Kalt Response on LEPs".[109] The United States does not comment on this request.

3.36. We have accepted Canada's request.

3.16 Paragraph 7.170

3.37. Canada requests that the Panel add a reference to "SPF" in the first sentence of this paragraph in the following manner: "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".[110] The United States does not comment on this request.

3.38. We have accepted Canada's request.

[106] Canada's request for interim review, p. 3.
[107] Canada's request for interim review, p. 4.
[108] Canada's request for interim review, p. 4.
[109] Canada's request for interim review, p. 4.
[110] Canada's request for interim review, p. 4.

3.17 Paragraph 7.175

3.39. Canada requests the Panel to revise the final sentence of this paragraph to accurately reflect the proposition contained in the affidavit of Mr Gardner of West Fraser (Exhibit CAN-31 (BCI)).[111] The United States did not comment on this request.

3.40. We have accepted Canada's request.

3.18 Paragraph 7.180, footnote 406 (footnote 405 of the Final Report)

3.41. Canada requests the Panel to include in this footnote references to certain exhibits, which for Canada, demonstrate that Québec proposed that Commerce should use auction prices for Crown stumpage.[112]

3.42. The United States does not comment on Canada's request.

3.43. We have decided to accommodate Canada's request and have modified this footnote, albeit not in the precise manner proposed by Canada.

3.19 Paragraph 7.181, footnote 407 (footnote 406 of the Final Report)

3.44. Canada requests the Panel to include in this footnote a reference to Québec's initial questionnaire response, which describes the functioning of the auction system.[113]

3.45. The United States does not comment on Canada's request.

3.46. We have decided to accommodate Canada's request and have modified this footnote, albeit not in the precise manner proposed by Canada.

3.20 Paragraph 7.193

3.47. Canada requests the Panel to move the reference to "Crown" in the second sentence so that it applies to both non-auction and auction timber which, Canada's asserts, are both technically forms of Crown timber. The revised sentence would indicate that "If the same group of consumers dominate the purchase of both non-auction ~~Crown~~ and auction **Crown** timber".[114]

3.48. The United States does not comment on Canada's request.

3.49. We have decided to accommodate Canada's request with respect to this paragraph and have modified the paragraph accordingly.

3.21 Paragraph 7.194, footnote 433 (footnote 432 of the Final Report)

3.50. Canada requests that the Panel revise the first sentence of footnote 433 to reflect the fact that sawmills can obtain *no more than* 75% of their residual mill need from TSGs, so that it is consistent with Canada's arguments and the Panel's findings elsewhere in the Interim Report.[115]

3.51. The United States does not comment on Canada's request.

3.52. We have accepted Canada's request by introducing the change it asks us to make, albeit with certain additional modifications.

[111] Canada's request for interim review, p. 5.
[112] Canada's request for interim review, p. 5.
[113] Canada's request for interim review, p. 5.
[114] Canada's request for interim review, pp. 5-6. (emphasis added by Canada)
[115] Canada's request for interim review, p. 6.

3.22 Paragraph 7.205

3.53. Canada requests that the Panel consider revising the final sentence in this paragraph, which contains a redundant reference to bids being limited "above TSG" prices. Canada notes that this sentence already refers to this by indicating that it is difficult to understand why a sawmill would limit bids at "any price".[116]

3.54. The United States objects to Canada's request, arguing that the requested modification is unnecessary. The United States submits that Canada's proposed modification would change the meaning of the Panel's statement, which draws a distinction between a scenario where bids are simply "above TSG" prices and a scenario where bids are "not 'significantly'" above TSG prices.[117] The United States suggests that the Panel make certain editorial changes to this paragraph if it considers that clarification is necessary.[118]

3.55. We consider that the reference to "above TSG" prices is redundant. We have therefore decided to accommodate Canada's request with respect to this paragraph and have modified the paragraph accordingly. We have also added the word "prices" after "TSG" in accordance with the United States' suggestion and corrected certain typographical errors that the United States identifies.

3.23 Paragraph 7.209

3.56. For greater clarity, Canada suggests that the Panel revise the third sentence in this paragraph in the following manner: "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, ~~how much~~ **the volume of such sales**".[119]

3.57. The United States does not comment on Canada's request.

3.58. We have decided to accommodate Canada's request with respect to this paragraph and have modified the paragraph accordingly.

3.24 Paragraph 7.214

3.59. Canada suggests that the Panel add a footnote to the end of the first sentence of this paragraph to provide a citation to Dr Marshall's examination of whether TSG-holders suppress their bids compared to non-sawmills or sawmills without TSGs. Canada also suggests that at the end of the second sentence the Panel revise footnote 463 (footnote 463 of the Final Report) to refer to the relevant part of Dr Marshall's report that concern bid reduction.[120]

3.60. The United States does not comment on Canada's request.

3.61. We have accepted Canada's request by adding the references it asks us to include.

3.25 Paragraphs 7.253 and 7.259

3.62. Canada requests the Panel to make certain "minor edits" to the first, second and third sentences of paragraph 7.253 to more accurately reflect Canada's argument that Alberta proposed using TDA log prices *to derive* a stumpage benchmark for Alberta Crown timber.[121] Canada requests a similar change to the first sentence of paragraph 7.259 to more accurately reflect Canada's argument.[122]

[116] Canada's request for interim review, p. 6.
[117] United States' comments on Canada's request for interim review, paras. 7-8.
[118] United States' comments on Canada's request for interim review, paras. 9-10.
[119] Canada's request for interim review, p. 6.
[120] Canada's request for interim review, p. 6.
[121] Canada's request for interim review, p. 7.
[122] Canada's request for interim review, p. 7.

3.63. The United States does not comment on Canada's request.

3.64. We have decided to accommodate Canada's request with respect to these paragraphs and have modified them accordingly.

3.26 Paragraph 7.328

3.65. Canada requests the Panel to replace the reference in the first sentence to "the preceding paragraph" with "the preceding paragraphs" so as to address the Brattle report's findings referred to in both preceding paragraphs, that is, paragraphs 7.326 and 7.327 of the Report.[123]

3.66. While the United States does not object to Canada's request, it proposes a slight modification of Canada's proposed edit to specify that the Panel is referring to the portions of the Brattle Report referred to in the two preceding paragraphs.[124]

3.67. We have decided to accommodate Canada's request and have modified this paragraph albeit not in the precise manner proposed by Canada. In particular, in accordance with the United States' suggestion, we have specified that the Panel is alluding to the portions of the Brattle Report referred to in the two preceding paragraphs.

3.27 Paragraph 7.352, footnote 711 (footnote 711 of the Final Report)

3.68. Canada requests the addition of a citation to Alberta, "Nova Scotia Tree Identification Guide", Exhibit CAN-304, p. 23 in the third sentence of this footnote.[125] The United States does not comment on Canada's request.

3.69. We have accepted Canada's request.

3.28 Paragraph 7.355

3.70. Canada requests the Panel to add a footnote to the effect that the USDOC separately recognized, in its analysis of whether it should consider British Columbia Crown stumpage prices on a "stand-as-a-whole" basis for the purposes of its benchmark, that the "species of a tree is an integral part of the value of that tree" and therefore selected a disaggregated species-specific benchmark calculation.[126] The United States argues that the Panel ought to reject Canada's request, as the addition that Canada seeks is not related to the issue discussed in the paragraph and would not contribute to resolving the dispute between the parties.[127]

3.71. We reject Canada's request. We consider that Canada's suggested addition is not indispensable to our analysis of the issue to which this paragraph is related. We also consider that the suggested addition is not necessary for the resolution of the dispute between the parties.

3.29 Paragraph 7.356

3.72. Canada requests the Panel to modify subparagraph (a) of this paragraph in a manner that would, in Canada's view, better reflect the argument made by Canada at paragraph 774 of its first written submission.[128] The United States contends that the Panel reject Canada's request, as paragraph 774 of Canada's first written submission does not clearly present the argument that Canada's suggested modification seeks to incorporate.[129]

[123] Canada's request for interim review, p. 8.
[124] United States' comments on Canada's request for interim review, para. 11.
[125] Canada's request for interim review, p. 8.
[126] Canada's request for interim review, p. 8.
[127] United States' comments on Canada's request for interim review, para. 12.
[128] Canada's request for interim review, p. 8.
[129] United States' comments on Canada's request for interim review, para. 13.

3.73. We agree with the United States. We consider that paragraph 774 of Canada's first written submission does not set out Canada's argument in the manner that Canada represents in this request for modification. We therefore reject Canada's request.

3.30 Paragraph 7.359

3.74. Canada requests the Panel to modify the fifth sentence of this paragraph in a manner that would, in Canada's view, better reflect the argument made by Canada at paragraph 774 of its first written submission.[130] The United States contends that the Panel reject Canada's request, as paragraph 774 of Canada's first written submission does not clearly present the argument that Canada's suggested modification seeks to incorporate.[131]

3.75. We note that this request concerns the same issue as that addressed in Canada's request concerning paragraph 7.356 of the Report. We therefore reject this request for the same reasons as that presented in paragraph 3.73. above.

3.31 Paragraph 7.360

3.76. Canada requests the Panel to make two changes to this paragraph. Canada requests the Panel to modify the first sentence of this paragraph in a manner that would, in Canada's view, better reflect the argument made by Canada at paragraph 774 of its first written submission.[132] Canada also requests the Panel to modify the third sentence of this paragraph to reflect an assertion made by Canada in Canada's response to Panel question No. 224, para. 260.[133] The United States contends that the Panel reject Canada's request concerning the first sentence of this paragraph, as paragraph 774 of Canada's first written submission does not clearly present the argument that Canada's suggested modification seeks to incorporate.[134] The United States does not comment on Canada's request concerning the third sentence of this paragraph.

3.77. We note that Canada's request regarding the first sentence of this paragraph concerns the same issue as that addressed in Canada's request concerning paragraph 7.356 of the Report. We therefore reject this request for the same reasons as those presented in paragraph 3.73. above.

3.78. As regards Canada's request concerning the third sentence of this paragraph, we note that Canada seeks a modification to this sentence such that it will reflect the following italicized assertion made by Canada in response to a question from the Panel:

> A harvested log that is considered "pulpwood" by a Nova Scotia purchaser could come from the upper portion of a harvested tree (with the log harvested from lower portion being considered a "sawlog" or "studwood"). *However, it could also come from the lower portion of a smaller harvested tree or from any portion of a harvested tree that exhibits defect that would render the wood unsuitable for lumber production.*[135]

We note that Canada did not substantiate with evidence the assertion that pulpwood could also come from the lower portion of a smaller harvested tree, or from any portion of a defective tree. We also note that, while explanations and evidence that Canada provided to us indicate the existence of sales of pulpwood derived from trees that also produced sawlogs or studwood[136], Canada has not pointed us to affirmative evidence on the record demonstrating the existence of sales of pulpwood derived from trees that produced pulpwood alone. We further note that Canada's unsubstantiated assertion reproduced in italics above is at odds with Canada's unqualified assertion in its first written submission that "sawlog, studwood, and pulpwood prices are all part of a single stumpage transaction".[137]

[130] Canada's request for interim review, p. 8.
[131] United States' comments on Canada's request for interim review, para. 13.
[132] Canada's request for interim review, pp. 8-9.
[133] Canada's request for interim review, pp. 8-9.
[134] United States' comments on Canada's request for interim review, para. 13.
[135] Canada's response to Panel question No. 224, para. 260.
[136] Canada's first written submission, paras. 797-798.
[137] Canada's first written submission, para. 786.

3.79. Therefore, we reject Canada's request concerning the third sentence of paragraph 7.360 of the Report.

3.32 Paragraph 7.365

3.80. Canada requests the Panel to modify the fourth sentence of this paragraph to reflect the fact that the referenced Ontario measurement is an "inside-the-bark diameter" rather than a "diameter at breast height", which is an outside-the-bark measurement.[138] The United States does not comment on Canada's request.

3.81. We have accepted Canada's request.

3.33 Paragraph 7.369

3.82. Canada requests the Panel to modify the fifth sentence of this paragraph to better reflect Canada's submission.[139] The United States does not respond to this request by Canada. While the United States comments on Canada's request concerning paragraphs 7.369, 7.371, 7.372, 7.373, and 7.375 together, the comment does not pertain to the issue raised by Canada in its request concerning paragraph 7.369.[140]

3.83. We have accepted Canada's request.

3.34 Paragraph 7.371

3.84. Canada requests the Panel to designate certain information in the third and fourth sentences of this paragraph as BCI. Canada also requests the Panel to modify the sixth sentence to better reflect Canada's argument.[141] In its common comment on modifications requested by Canada to paragraphs 7.369, 7.371, 7.372, 7.373, and 7.375, the United States contends that Canada's request seeks to improperly recharacterize the composition of the Nova Scotia benchmark and that the Panel has already properly described the facts in these paragraphs.[142]

3.85. We note that the modification sought by Canada to the sixth sentence of paragraph 7.371 relates to the manner in which we have reproduced Canada's own argument, and not to our factual findings concerning the composition of the Nova Scotia benchmark. Therefore, we do not see how the concerns raised by the United States in its common comment on modifications requested by Canada to paragraphs 7.369, 7.371, 7.372, 7.373, and 7.375 is pertinent to Canada's request at issue. We have accepted Canada's requests concerning this paragraph, including Canada's request concerning BCI designation..

3.35 Paragraph 7.372

3.86. Canada requests the Panel to modify the first sentence of this paragraph to better reflect what Canada was attempting to establish in its submissions.[143] In its common comment on modifications requested by Canada to paragraphs 7.369, 7.371, 7.372, 7.373, and 7.375, the United States contends that Canada's request seeks to improperly recharacterize the composition of the Nova Scotia benchmark and that the Panel has already properly described the facts in these paragraphs.[144]

3.87. We note that the modification sought by Canada to the first sentence of paragraph 7.372 concerns the manner in which we have reproduced Canada's own argument, and not our factual findings concerning the composition of the Nova Scotia benchmark. Therefore, we do not see how the concerns raised by the United States in its common comment on modifications requested by Canada to paragraphs 7.369, 7.371, 7.372, 7.373, and 7.375 is pertinent to Canada's request at issue.

[138] Canada's request for interim review, p. 9.
[139] Canada's request for interim review, p. 9.
[140] United States' comments on Canada's request for interim review, para. 14.
[141] Canada's request for interim review, p. 9.
[142] United States' comments on Canada's request for interim review, para. 14.
[143] Canada's request for interim review, p. 10.
[144] United States' comments on Canada's request for interim review, para. 14.

3.88. Nevertheless, we reject Canada's request. We note that accepting Canada's change would imply that Canada submitted before us that the Nova Scotia "benchmark price was based on the stumpage price allocated to a subset of logs (i.e. sawlogs and studwood) produced upon harvesting timber".[145] Canada's prior submissions in this dispute, however, indicated to us that Canada was arguing that the Nova Scotia benchmark price comprised *log prices*, and not *stumpage price* allocated to a subset of logs.[146] Our phrasing of Canada's submission on this point is in fact in keeping with Canada's own framing of what in its view the Nova Scotia survey measured – i.e. "prices paid for [] a subset of logs harvested from [] standing timber".[147] We therefore reject Canada's request.

3.36 Paragraphs 7.373 and 7.375

3.89. Canada requests the Panel to modify paragraph 7.373 and the second sentence of paragraph 7.375 to better reflect what Canada was attempting to establish in its submissions.[148] In its common comment on modifications requested by Canada to paragraphs 7.369, 7.371, 7.372, 7.373, and 7.375, the United States contends that Canada's request seeks to improperly recharacterize the composition of the Nova Scotia benchmark and that the Panel has already properly described the facts in these paragraphs.[149]

3.90. We note that Canada's request concerning these paragraphs is identical to its request concerning paragraph 7.372. We therefore reject Canada's request based on the same reasoning as that set out in paragraph 3.88. above.

3.37 Paragraph 7.409, footnote 846 (footnote 846 of the Final Report)

3.91. Canada asks the Panel to designate certain information in this footnote as BCI.[150] The United States does not comment on this request.

3.92. We have accepted Canada's request.

3.38 Paragraph 7.426

3.93. Canada asks the Panel to designate certain information in this paragraph as BCI.[151] The United States does not comment on this request.

3.94. We have accepted Canada's request.

3.39 Paragraph 7.428

3.95. Canada requests the Panel to substitute the reference to Deloitte in the first sentence of this paragraph with a reference to Nova Scotia.[152] The United States does not comment on Canada's request.

3.96. We have accepted Canada's request.

3.40 Paragraph 7.429

3.97. Canada asks the Panel to designate certain information in this paragraph as BCI.[153] The United States does not comment on this request.

3.98. We have accepted Canada's request.

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[145] Canada's request for interim review, p. 10.
[146] See e.g. Canada's response to Panel question No. 219, paras. 200, 206, 214, and 222 (indicating that the Nova Scotia survey measured logs prices).
[147] Canada's response to Panel question No. 219, para. 200.
[148] Canada's request for interim review, p. 10.
[149] United States' comments on Canada's request for interim review, para. 14.
[150] Canada's request for interim review, p. 10.
[151] Canada's request for interim review, pp. 10-11.
[152] Canada's request for interim review, p. 11.
[153] Canada's request for interim review, p. 11.

3.41 Paragraph 7.430

3.99. Canada asks the Panel to modify the BCI designation for certain information in this paragraph.[154] The United States does not comment on this request.

3.100. We have accepted Canada's request.

3.42 Paragraph 7.432

3.101. Canada requests the Panel to specify in the first sentence of this paragraph that prices in Québec are transposed based on auction prices.[155] The United States does not comment on this request.

3.102. We have accepted Canada's request.

3.43 Paragraph 7.436

3.103. Canada requests the Panel to revise subparagraph (c) of this paragraph to more fully reflect the finding of the USDOC reproduced in that subparagraph.[156] The United States asks the Panel to reject Canada's request as, in the United States' view, the subparagraph appropriately characterizes the relevant finding of the USDOC and Canada's suggested modification would be an inappropriate characterization thereof.[157]

3.104. We note that the language used in subparagraph (c) closely mirrors the language used by the USDOC in the relevant part of the final determination.[158] That being the case, we do not find it necessary to consider modifying the language of subparagraph (c) in the manner suggested by Canada. We therefore reject Canada's request.

3.44 Paragraph 7.439

3.105. Canada requests the Panel to add a reference to "mandatory charges" after the reference to "mandatory in-kind costs" in the first sentence of this paragraph to reflect the full scope of the remuneration that the USDOC ignored.[159] The United States asks the Panel to reject Canada's request, arguing that adding a reference to "mandatory charges" would change the meaning of the Panel's statement, if the Panel's finding is intended to relate only to in-kind costs and not to the separate question of mandatory charges.[160]

3.106. We note that Canada's argument examined in this paragraph concerns the USDOC's failure to consider mandatory charges, as well as mandatory in-kind costs, as part of the full remuneration paid by the respondent companies in exchange for the right to harvest Crown-timber.[161] Further, as evident from footnote 903 of the Final Report, the section of the Report in which this paragraph is placed seeks to examine the validity of the basis on which the USDOC refused to provide adjustments for, *inter alia*, certain mandatory charges including "annual fees, [Forest Resource Improvement Association of Albert] dues, holding and protection charges". Thus, we have accepted Canada's request to add a reference to "mandatory charges" in the first sentence of this paragraph. The reasoning we have presented in this paragraph applies to mandatory charges as well as mandatory in-kind costs, and the omission of a reference to "mandatory charges" from the first sentence was inadvertent.

[154] Canada's request for interim review, p. 11.
[155] Canada's request for interim review, p. 11.
[156] Canada's request for interim review, pp. 11-12.
[157] United States' comments on Canada's request for interim review, para. 15.
[158] Final determination, (Exhibit CAN-10), p. 138 ("parties have provided no evidence that the stumpage rates set by the provincial governments are adjusted to account for the revenue from any fees or charges required under long-term tenure Agreements").
[159] Canada's request for interim review, p. 12.
[160] United States' comments on Canada's request for interim review, para. 16.
[161] Canada's first written submission, para. 869.

3.45 Paragraph 7.458

3.107. Canada requests us to modify this paragraph by removing part of a sentence that it considers to be repetitive.[162] The United States objects to the specific modifications proposed by Canada but suggests some minor (alternative) changes if we consider it necessary to make modifications in light of Canada's comments.[163]

3.108. We note that the sentence alluded by Canada cites statements made by the USDOC in its final determination. We are of the view that the changes proposed by the United States adequately clarify this sentence. Therefore, we decline to modify this paragraph in the manner proposed by Canada.

3.46 Paragraphs 7.480 and 7.482

3.109. Canada requests certain modifications in these paragraphs to more clearly reflect some of its submissions.[164] The United States does not comment on Canada's request.

3.110. We have modified the paragraphs in the manner proposed by Canada.

3.47 Paragraph 7.483

3.111. Canada proposes a modification in this paragraph to reflect that conversion factors vary drastically between species, grade and conditions of logs.[165] The United States objects to Canada's request by noting that this paragraph discusses what the USDOC actually did, whereas Canada's request reflects what in Canada's view the USDOC should have done.[166]

3.112. We decline Canada's request, because its proposed modifications do not add to the clarity of the factual descriptions contained in this paragraph.

3.48 Paragraph 7.485

3.113. Canada requests certain modifications to better reflect its arguments concerning the BC Dual-Scale Study and the Spelter Study.[167] The United States does not comment on Canada's request.

3.114. We have made the modifications requested by Canada.

3.49 Paragraph 7.490

3.115. Canada proposes that we make certain additions in the first sentence of this paragraph or in a footnote.[168] The United States does not comment on Canada's request.

3.116. We note that the additions requested by Canada are reflected in its first written submission and its exhibits, which form part of our record. In our view, the additions do not enhance the clarity of our report or are otherwise necessary. Therefore, we decline to modify this paragraph in the manner proposed by Canada.

3.50 Paragraph 7.501

3.117. Canada requests us to replace the first two sentences of this paragraph.[169] Canada notes that the first sentence of this paragraph, as drafted, could be misinterpreted to indicate that each

[162] Canada's request for interim review, p. 12.
[163] United States' comments on Canada's request for interim review, para. 17.
[164] Canada's request for interim review, pp. 12-13.
[165] Canada's request for interim review, p. 13.
[166] United States' comments on Canada's request for interim review, para. 18.
[167] Canada's request for interim review, p. 13.
[168] Canada's request for interim review, p. 13.
[169] Canada's request for interim review, p. 14.

species has its own distinct grading system.[170] In addition, Canada suggests revising the third sentence of this paragraph.[171] The United States does not comment on Canada's request.

3.118. We have made the modifications requested by Canada albeit using language slightly different than that proposed by Canada.

3.51 Paragraphs 7.506, 7.509, and 7.524

3.119. Canada proposes certain clarifications in each of these paragraphs.[172] The United States does not comment on Canada's proposal.

3.120. We have for the most part made the changes proposed by Canada albeit using language slightly different than that proposed by Canada.

3.52 Paragraphs 7.560-7.561

3.121. Canada requests that the Panel remove the reference to "and provide offsets for negative comparisons" in the third sentence of paragraph 7.560 to more accurately describe Canada's arguments.[173] Canada also requests the removal of the phrase "and thus provide offsets for negative comparison results" in the second sentence of paragraph 7.561 for the same reasons. Canada asserts that it has not argued that an investigating authority may be required to "provide offsets" aside from being required to aggregate comparison results in certain circumstances. Canada also invites the Panel to consider whether references to similar phrases are appropriate in paragraphs 7.562 and 7.584.[174] The United States asserts that Canada was arguing before the Panel that the USDOC was required to aggregate all the comparison results and offset the positive comparison results by the amount of any negative comparison results.[175] The United States also asserts that the fact of aggregation is not in dispute, and the USDOC did aggregate all results, including those where the benefit amount was zero.[176]

3.122. We acknowledge that in its submissions, Canada explicitly indicated that it was not arguing that the USDOC was required to "provide offsets".[177] We also note that the parts of Canada's submissions that the United States refers to in support of its assertion that Canada took the position that the USDOC was required to aggregate all the comparison results and offset the positive comparison results by the amount of any negative comparison results, do not in fact use the term "offset" in context of the relevant argument. We, therefore, accept Canada's request regarding references to the term "offsets" in Canada's contention in paragraphs 7.560 and 7.561 of the Report.

3.123. We are also mindful of the United States' concern that a simple reference to "aggregation of all comparison results" in the relevant portions of these paragraphs without a reference the notion of offsetting, may obscure the dispute between the parties, as comparison results in respect of which the USDOC determined the benefit amount to be zero could technically be considered to have already been "aggregated" with other comparison results by the USDOC.[178] We have modified the relevant sentences in paragraphs 7.560 and 7.561 of the Report in a manner that avoids such obscurity.

3.124. We have also made the same modification in paras. 7.562 and 7.584 as we consider that these modifications do not affect the substance of our reasoning.

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[170] Canada's request for interim review, p. 14.
[171] Canada's request for interim review, p. 14.
[172] Canada's request for interim review, p. 14.
[173] Canada's request for interim review, p. 15.
[174] Canada's request for interim review, p. 15.
[175] United States' comments on Canada's request for interim review, para. 21 (referring to Canada's firstwritten submission, paras. 935 and 940).
[176] United States' comments on Canada's request for interim review, para. 22.
[177] Canada's second written submission, para. 291; response to Panel question No. 263, paras. 370 and 380.
[178] United States' comments on Canada's request for interim review, paras. 19 and 22.

3.53 Paragraph 7.580, footnote 1156 (footnote 1156 of the Final Report)

3.125. Canada notes that footnote 1156 indicates that emphasis was added to the Panel's quotation from the Report in *US – Anti-Dumping and Countervailing Duties (China)*, but it appears that the only emphasis is in the Panel's introduction of the quotation.[179] The United States does not comment on this statement by Canada.

3.126. We have deleted the phrase "emphasis added" from this footnote.

3.54 Paragraph 7.587

3.127. Canada requests us to replace the reference to "these export restrictions" in the last sentence of this paragraph to either "these export regulations" or "the LEP process" in order to be consistent with earlier sections of our report where we refer to the LEP process as regulations, not restraints.[180] The United States opposes Canada's request, contending that the reference to "export restrictions" is consistent with other references in this paragraph, and submits that the Panel's findings in other parts of the report are not relevant here.[181]

3.128. We note that the parties' comments concern the opening paragraph of our analysis concerning Canada's claims under Articles 1.1(a)(1)(iv), 11.2, and 11.3 of the SCM Agreement with respect to the export-permitting process for British Columbia logs. Here (along with paragraph 7.588), we were setting out a brief overview of the circumstances that give rise to Canada's claims. Having considered both parties' comments, we are of the view that the changes requested by Canada do not affect our factual or legal analysis and are consistent with references in other parts of our report. We have therefore made the modifications requested by Canada in the last sentence of this paragraph by replacing the phrase "these export restrictions" with "the LEP process".

3.55 Paragraph 7.588

3.129. Canada requests certain modifications in this paragraph to more accurately reflect the manner in which Canada articulated its argument in these panel proceedings.[182] The United States does not comment on Canada's request.

3.130. We have made the modifications requested by Canada.

3.56 Paragraph 7.595

3.131. Canada requests certain additions in this paragraph to more accurately reflect the facts on the USDOC's record.[183] The United States does not comment on Canada's request.

3.132. We have made the modifications requested by Canada.

3.57 Paragraph 7.600, footnote 1182 (footnote 1182 of the Final Report)

3.133. Canada requests us to add parallel citations to certain WTO panel and Appellate Body reports in footnote 1182.[184] The United States does not comment on Canada's request.

3.134. We note that we have cited the panel and Appellate Body reports referred by Canada in other parts of the report as part of our analysis. We do not consider the additions proposed by Canada in this footnote add to the clarity of our analysis or are otherwise necessary. Therefore, we decline Canada's request.

[179] Canada's request for interim review, p. 16.
[180] Canada's request for interim review, p. 16.
[181] United States' comments on Canada's request for interim review, para. 25.
[182] Canada's request for interim review, p. 16.
[183] Canada's request for interim review, p. 16.
[184] Canada's request for interim review, p. 17.

3.58 Paragraph 7.603, footnote 1190 (footnote 1190 of the Final Report)

3.135. Canada invites us to clarify whether in this footnote we intended to indicate that we disagree with the proposition that entrustment or direction occur "only" when there is an explicit and affirmative delegation or command from the government to a private body.[185] The United States does not comment on Canada's submission in this regard.

3.136. We note, as observed by Canada, the word "only" was inadvertently omitted in this footnote and indeed in this footnote we intended to convey our disagreement with the view that entrustment or direction occur "only" when there is an explicit and affirmative delegation or command from the government to a private body. We have made the necessary modifications in this footnote.

3.59 Paragraph 7.605

3.137. Canada requests certain modifications in this paragraph to accurately reflect its submissions.[186] The United States does not comment on Canada's request.

3.138. We have made the modifications requested by Canada.

3.60 Paragraph 7.607

3.139. Canada requests certain modifications in the fourth and sixth sentence of this paragraph.[187] The United States does not comment on Canada's request.

3.140. We have modified the sixth sentence of this paragraph in the manner proposed by Canada. However, we do not consider that the modifications proposed by Canada in the fourth sentence add to the clarity of our report, and therefore decline to make these modifications.

3.61 Section 7.10, subheading and paragraphs 7.620-7.624

3.141. Canada requests the Panel to insert a reference to "forest management" in several places in these paragraphs in addition to the reference to "silviculture" to reflect the full scope of JDIL's obligations pertinent to Canada's claim examined in these paragraphs.[188] The United States does not generally oppose the modifications requested by Canada, but asserts that the Panel's summary and characterization of the United States' arguments in the first sentences of paragraphs 7.621, 7.622, and 7.623 are accurate and the Panel should therefore decline to make modifications to those sentences.[189]

3.142. We have made the modifications requested by Canada, but we do not modify the first sentences of paragraphs 7.621, 7.622, and 7.623 as these sentences reproduce the United States' argument, and the United States has indicated that they do so accurately.

3.62 Paragraph 7.725

3.143. Canada requests certain revisions to better reflect its view.[190] The United States does not comment on Canada's request.

3.144. We have made the revisions requested by Canada.

[185] Canada's request for interim review, p. 17.
[186] Canada's request for interim review, p. 17.
[187] Canada's request for interim review, p. 17.
[188] Canada's request for interim review, pp. 18-19.
[189] United States' comments on Canada's request for interim review, para. 27.
[190] Canada's request for interim review, p. 19.

3.63 Paragraph 7.729

3.145. Canada requests certain revisions in the first sentence of this paragraph to more accurately reflect the USDOC's final determination.[191] The United States does not comment on Canada's request.

3.146. We have made the revisions requested by Canada.

3.64 Paragraph 8.1

3.147. Canada observes that the Panel's summary of its conclusions at paragraph 8.1 omits its conclusions at paragraph 7.630 of the Report. Canada requests that the Panel add the following conclusion between subparagraphs 8.1(j) and (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.[192]

The United States does not comment on this request.

3.148. We have accepted Canada's request.

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[191] Canada's request for interim review, p. 20.
[192] Canada's request for interim review, pp. 20-21.

ANNEX B

ARGUMENTS OF THE PARTIES

ANNEX B-1

INTEGRATED EXECUTIVE SUMMARY OF THE
ARGUMENTS OF CANADA

I. THE UNITED STATES IMPROPERLY DETERMINED THE BENEFIT CONFERRED BY THE PROVISION OF PROVINCIAL CROWN TIMBER

1. Article 14(d) requires the U.S. Department of Commerce ("Commerce") to assess adequacy of remuneration using benchmarks that reflect prevailing conditions in the market for the government-provided good. It did not do so in this case. Instead, Commerce improperly relied on benchmarks from external markets that did not, and could not, reflect prevailing conditions in the different regional markets where the provincial governments provided Crown timber.

A. Article 14(d) Required Commerce to Assess Adequacy of Remuneration Using In-Market Benchmarks

2. Article 14(d) requires an investigating authority to assess whether the "provision of goods […] by a government" occurred for less than adequate remuneration in relation to "prevailing market conditions" for the good "*in question*" in the country of provision. The good "in question" is the government-provided good—in this case, the right to harvest provincial Crown timber. The record in Commerce's investigation is clear not only that provincial governments provided the good in question, but also that the prevailing market conditions for this provincially-provided Crown timber differed significantly from province-to-province. Accordingly, Article 14(d) required Commerce to assess adequacy of remuneration in relation to the distinct prevailing conditions in each market for provincial Crown timber.

3. The Spanish version of Article 14(d) confirms that the relevant prevailing market conditions are those that are prevailing *in the market* for the government-provided good. This equally authoritative version of Article 14(d) indicates that adequacy of remuneration must be determined in relation to "las condiciones reinantes en el mercado para el bien […] de que se trate", which is separated by a comma from the reference to "en el país de suministro". It is evident that Article 14(d) contemplates that there may be more than one market for the good in the country of provision, and that when this is the case, it requires an assessment of adequacy of remuneration in relation to the relevant regional market in which the government provided the good.

4. The context of Article 14(d) further confirms this interpretation. The Appellate Body has found that Article 14 imposes the same obligation as Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994, which have been interpreted as requiring an investigating authority to ascertain the amount of subsidization as accurately as possible.[1] The accuracy with which the amount of an alleged subsidy can be calculated in a benchmarking exercise will depend on how closely the benchmark reflects the prevailing conditions in the market for the government-provided good. The term "market" in Article 14(d) refers to "'a *place* … with a demand for a commodity or service'; '*a geographical area* of demand for commodities or services'; '*the area of economic activity* in which buyers and sellers come together and the forces of supply and demand affect prices'".[2]

5. The Appellate Body recognized this in *Canada – Renewable Energy / Canada – Feed-in Tariff Program* when it found that, where there are regional markets for a good, adequacy of remuneration must be assessed in relation to prevailing market conditions in the relevant "[provincial] regional market as opposed to other out-of-province markets, within Canada or another country".[3]

6. There is no national stumpage market in Canada. Instead, the relevant areas where supply and demand for standing timber interact are, in the case of Alberta, Ontario, Québec, and New Brunswick, within each of those provinces, and in the case of British Columbia, the B.C. Interior. The regional nature of these markets is driven by the fact that Crown timber is an immovable good, and

[1] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.152.
[2] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.150. (Emphasis added)
[3] Appellate Body Reports, *Canada – Renewable Energy/Canada – Feed-in Tariff Program*, fn. 746 to para. 5.239.

that the provinces are responsible under the Canadian Constitution for establishing the legal and regulatory framework for forestry. These realities shape the areas in which the forces of supply and demand interact.

B. Article 14(d) Permits the Rejection of In-Market Benchmarks Only in "Very Limited" Circumstances

7. Commerce's decision to reject provincial in-market benchmarks is irreconcilable with the Appellate Body's finding that, as a legal matter, such a rejection is only permitted in "very limited" circumstances, where an investigating authority explains *how* government intervention results in *actual price distortion*.[4] The Appellate Body also explained that "[…] 'price distortion' is not equivalent to *any* impact on prices as a result of *any* government intervention", and further emphasized that Article 14(d) does not require a comparison to "a 'pure' market, to a market 'undistorted by government intervention', or to a 'fair market value'".[5]

8. The Appellate Body recalled, in relation to the evidentiary threshold under Article 14(d), that a panel must critically examine an investigating authority's explanation, in depth, and in light of the evidence to ensure, among other things, that the investigating authority: (1) takes into account the arguments and evidence supplied by the interested parties, together with all other information, so that its determination of how prices in the specific markets at issue are actually distorted as a result of government intervention is based on positive evidence; (2) engages with and analyzes the methods, data, explanations, and supporting evidence, in order to ensure that its finding of price distortion is not contradicted by evidence and explanations; and (3) fully addresses the nature and complexities of the data and whether it appears adequate in the light of alternative methods, data, and explanations of that data.[6]

9. Finally, the Appellate Body reaffirmed that a panel *must* find that an investigating authority's explanation is not reasoned or is not adequate if an alternative explanation of the facts is plausible, and the investigating authority's explanation does not seem adequate in the light of that alternative explanation.

10. The essential deficiencies in Commerce's reasoning in the compliance proceedings in *US – Countervailing Measures (China)* are directly analogous to the deficiencies in Commerce's reasoning in the investigation at issue in this case.

11. Commerce repeatedly failed to explain how the government predominance or intervention it identified actually resulted in price distortion in the relevant auction, private standing timber, or private log markets. The explanations it did offer on these issues were superficial and not supported by positive evidence. In addition, Commerce failed to address the underlying auction, private standing timber, and log price data. Nor did it meaningfully analyze or engage with numerous expert reports on economic and forestry issues. In fact, the United States admits that Commerce simply presumed that these reports were at risk of bias and warranted limited or no substantive consideration or weight. Finally, Commerce repeatedly ignored evidence that directly contradicted its conclusions concerning government predominance and intervention in the relevant auction, private standing timber, and private log markets.

12. These deficiencies render Commerce's determination inconsistent with Article 14(d).

C. Commerce Improperly Rejected Benchmarks in Different Regional Markets for Provincial Crown Timber

13. In the Final Determination, Commerce improperly rejected in-market benchmarks for determining the adequacy of remuneration for provincial Crown timber in the B.C. Interior, Alberta, Ontario, Québec, and New Brunswick, despite evidence that these prices were market-determined and reflected the prevailing market conditions in each of the different regional markets. Contrary to its obligations under Article 14(d), Commerce's decisions to reject these in-market benchmarks

[4] Appellate Body Report, *US – Countervailing Measures (China) (Article 21.5 – China)*, para. 5.155.
[5] Appellate Body Report, *US – Countervailing Measures (China) (Article 21.5 – China)*, paras. 5.135 and 5.146. (Emphasis in original)
[6] Appellate Body Report, *US – Countervailing Measures (China) (Article 21.5 – China)*, paras. 5.155, 5.157 and 5.164.

resulted in an inaccurate determination of the existence and amount of any benefit in each of the relevant regional markets.

1. B.C. Interior

14. British Columbia sells a substantial and representative portion of its Crown timber through competitive "first price, sealed bid" auctions run by BC Timber Sales ("BCTS"). BCTS auction data are then used in British Columbia's Market Pricing System ("MPS") to determine statistically reliable, market-based stumpage prices for B.C. Crown timber on long-term tenures. The three respondent companies that operate in B.C.—Canfor, Tolko, and West Fraser—operate only in the B.C. Interior, a region separate from the B.C. Coast.

15. Commerce improperly rejected BCTS auction prices as valid, in-market benchmarks for provincial Crown timber in the B.C. Interior. It claimed that BCTS auction prices were distorted—and thus, not market-determined—based on unreasonable, inadequately explained, and internally inconsistent reasoning that was not supported, and often directly contradicted, by record evidence.

16. First, Commerce erroneously claimed that the B.C. stumpage market was distorted because the majority of the market is controlled by British Columbia. The United States claims that Commerce found that government predominance, combined with the alleged flaws in the BCTS auction system, resulted in price distortions that would generate a circular comparison. This ignores the fact that "government predominance" cannot cause price distortion in British Columbia, as the MPS uses BCTS auction data to establish the prices for the non-auctioned portion of the Crown harvest. By definition, then, the prices of the non-auctioned portion of the Crown harvest cannot affect BCTS auction prices in a manner that would generate a circular comparison. Nor was there excess supply of provincial Crown timber that was economic to harvest.

17. Second, Commerce erred in rejecting BCTS auction prices on the basis that there was inadequate competition as a result of market concentration, failing to recognize that the level of market concentration and competition among the consumers of Crown timber is a prevailing market condition. The United States, in response, claims that Commerce's market concentration analysis was a conditional exercise contingent upon having found the market to be predominantly supplied by the government. Because government predominance cannot cause price distortion in British Columbia, the inescapable conclusion based on the United States' own logic that Commerce's market concentration analysis likewise cannot cause price distortion.

18. Third, Commerce claimed that BCTS auction prices could not be used as an in-market benchmark because the three-sale limit allegedly imposed an artificial barrier to participation in BCTS auctions. It cited no evidence to support its claim that the three-sale limit failed to encourage competition, and instead, simply speculated that it resulted in fewer bidders in the auctions. In addition, Commerce claimed at the same time that the three-sale limit had been effectively nullified in practice. Nowhere does the United States or Commerce explain how a limit that has been effectively nullified could bar participation so as to distort auction prices, much less that auction prices were actually distorted as a result.

19. Commerce then claimed that the three-sale limit introduced an additional source of market distortion in the form of "cutting rights fees". However, the record evidence showed that only Tolko paid cutting rights fees on a negligible percentage of BCTS auction transactions, and that these fees were immaterial to Tolko's overall costs. In addition, Commerce's theory that cutting rights fees lower winning bids for auctioned timber defies basic economic logic. Discounting one's bid on the basis of a cutting rights fee would only open the door to another bidder winning the auction with a higher bid.

20. In reaching these conclusions, Commerce also failed to take into account the expert evidence of Dr. Athey, a world-renowned expert in auction design, demonstrating that BCTS auctions and the MPS were not only explicitly *designed* to generate market prices, but which were empirically verified to have produced competitive, market-determined prices for B.C. Crown timber.

21. Finally, Commerce claimed that the log export permitting ("LEP") process for B.C. logs provided a further basis for rejecting BCTS auction prices. However, its analysis did not even come close to establishing that the LEP process *actually results* in price distortion in the BCTS auctions in the B.C. Interior. Indeed, Commerce's determination that the LEP process suppresses log prices is

based on the false premise that it inhibits log exports from the B.C. Interior. But this finding failed to meaningfully engage with the extensive evidence showing that it is not economic to export logs from most of the B.C. Interior because of the geographic and economic realities of the market, including the barrier of the Coast Mountains and long transportation distances that separate most of the Interior from export opportunities. It also failed to engage with the evidence showing that significant volumes of logs authorized for export were unutilized in the B.C. Interior and the Tidewater, demonstrating that the LEP process does not restrain exports.

22. Indeed, the evidence that Commerce relies on to support its belief that the volume of log exports from the Interior is low because of the LEP process pertains to the Coast, but approximately 30% of the Coastal harvest is still exported—significantly more than the 18% of the U.S. Pacific Northwest harvest that is exported. Commerce's assertion that the LEP process inhibits log exports from the B.C. Interior is unsupported by positive record evidence, and does not establish that the LEP process actually results in price distortion in the BCTS auctions in the Interior.

23. The Appellate Body has explained that, where an investigating authority's analysis is based on the "totality of the evidence", a panel must "evaluat[e] […] the significance of the different factors considered by [that] investigating authority", and that "an error at an intermediate stage of reasoning may invalidate the final conclusion".[7] Whether viewed independently or in its totality, each of Commerce's findings has failed to reasonably and adequately explain how BCTS auction prices are distorted as a result of government intervention, and thus not market-determined.

2. Alberta

24. Alberta provided Commerce with extensive evidence supporting the use of an in-market benchmark, derived from private arm's-length log prices in the province, to assess the adequacy of remuneration for provincial Crown timber. Canada has explained that in-market prices for this similar good may only be rejected as a valid benchmark if they were distorted as the result of government intervention in the market. Commerce's rejection of the proposed benchmark was WTO-inconsistent for three reasons.

25. First, Commerce summarily rejected the proposed private log benchmark because it preferred to use a benchmark for the same good, i.e. standing timber. But Commerce's regulatory preferences are not relevant under Article 14(d). The United States concedes that logs are a similar good to standing timber. It is also uncontested that in-market log prices reflect critical prevailing market conditions in Alberta, such as species composition, growing conditions, and harvesting and transportation costs. In fact, Commerce has used log benchmarks for standing timber, including in the Final Determination itself, and on remand in the previous lumber investigation.

26. Second, Commerce erred by finding, in the alternative, that private log prices could not be used as a benchmark. This finding is completely undermined by Commerce's own admission that it did not even assess whether the Alberta log market or private log prices were distorted by government intervention. Commerce ignored expert evidence that concluded the proposed benchmark was derived from market-determined prices. Alberta simply does not set log prices or intervene in the log market in a manner that results in the distortion of private log prices.

27. Third, Commerce justified its rejection of the proposed benchmark on the basis of four flawed findings that purported to show that Alberta log prices were inconsistent with market principles. Despite U.S. attempts to sow confusion, Commerce failed to provide a reasoned and adequate explanation for any of these findings. The first two pertain only to so-called "salvage" transactions (in which sawmills purchase timber removed during oil and gas operations) and were completely irrelevant with respect to some 90% of the private log transactions before Commerce. These findings were also wrong. Commerce found that salvage prices do not represent the price of mature timber and that some salvage transactions were "required" non-market transactions. There is no evidence that salvage transactions involved immature timber, and the record evidence demonstrates that *all* log transactions occurred between willing, unpressured parties.

28. Commerce also found that it would be circular to compare a log-based benchmark to provincial Crown timber prices as many logs originated on Crown land. As a matter of economics, log sellers will not willingly pass on any benefit attaching to standing timber to a log buyer. The Appellate Body

[7] Appellate Body Report, *Japan – DRAMs (Korea)*, para. 135.

has cautioned Commerce that it cannot assume any benefit "passes through" in an arm's-length log sale. But Commerce did not point to *any* evidence of pass-through. Nor could Commerce point to any evidence that Crown liens on logs affected private log prices or introduced risk that would not arise in the open market, especially as similar liens exist in Commerce's benchmark jurisdiction of Nova Scotia. Finally, Commerce found that private log prices were depressed as the result of a log export ban. However, the expert evidence before Commerce confirmed that there was no ban, and there was no evidence that Alberta's log export authorization process had any effect on log prices.

3. Ontario

29. Commerce was provided with evidence to support two viable in-market benchmarks with which to assess the adequacy of remuneration paid for Crown-origin timber in Ontario. Specifically, Commerce was presented private market coniferous standing timber prices in Ontario collected by MNP LLP, and arm's-length log prices from Ontario's robust log market based on a survey conducted by KPMG LLP. Commerce dismissed this evidence without proper analysis in a manner inconsistent with Article 14(d).

30. Commerce rejected private stumpage prices as a benchmark on the basis that Ontario's provision of provincial Crown timber had distorted these private market prices. Commerce's evidence failed to establish the link between the government's role in the market and any price distortion. Instead, it simply made an impermissible *per se* finding. There is no threshold above which the government being the predominant supplier in the market alone becomes sufficient to establish price distortion. Ontario, meanwhile, provided the MNP Survey and the expert report of Dr. Ken Hendricks, which demonstrated that the private market for standing timber was not distorted by the provision of provincial Crown timber. In particular, Dr. Hendricks concluded that, because sawmills in Ontario had excess capacity, the supply of provincial Crown timber had no impact on the harvesters' evaluation of private softwood timber stands, and therefore did not distort softwood prices in the private timber market during the period of investigation. Commerce failed to grapple with the uncontroverted evidence of excess mill capacity in Ontario.

31. Commerce also ignored evidence of a valid and robust private log market in Ontario. It made no finding of price distortion with respect to these private arm's-length log prices, which reflected prevailing market conditions for standing timber in Ontario. Instead, it claimed that, there were other in-country prices for standing timber, so it was unnecessary for Commerce to examine private log prices. In doing so, Commerce failed to meet its obligation as an investigating authority and acted inconsistently with Article 14(d) of the SCM Agreement.

4. Québec

32. Commerce erroneously rejected Québec's auction benchmark based on speculation rather than actual evidence of price distortion in a manner inconsistent with Article 14(d). Commerce also improperly dismissed the independent, comprehensive, and empirical analysis conducted by Professor Robert Marshall on the design, performance, and representativeness of the auctions, as well as the underlying auction data. There are several problems with Commerce's assessment of the evidence and its reasoning.

33. First, Commerce erroneously determined that the alleged government predominance in the market for standing timber resulted in price distortion. It failed to consider evidence that demonstrated that TSG-allocated volumes cannot fully supply mill needs, which rebutted Commerce's allegation that there is a "strong motivation" to treat TSG-guaranteed volume as the primary source of supply. With only 51.75% of the market for standing timber supplied through TSGs, Commerce ignored the fact that Québec was only a "significant" supplier of timber. It was not permitted to find price distortion simply on the basis of the government's market share as a supplier.

34. Second, Commerce erred in finding that alleged market concentration demonstrated that the Québec auctions are not market-determined. In making this observation, Commerce ignored the fact that market concentration is simply a "prevailing market condition", and not a basis for rejecting a benchmark under Article 14(d).

35. Third, Commerce engaged in speculation concerning the incentives and motivations of bidders in Québec's auctions. However, in making these speculative findings, Commerce ignored expert evidence explaining that TSG-holders do not suppress auction bids to prevent TSG prices from

increasing, and that winning bids are regularly above the estimated auction price. It also ignored record evidence which demonstrating that both TSG-holders and non-TSG-holders must compete in the auctions to meet their wood fibre needs and to operate profitably.

36. Commerce further speculated that unsold auction timber, and TSG-holders' ability to shift minor amounts of their TSG allocations, were additional signs that bidders would not make aggressive bids. However, Commerce failed to consider uncontested evidence showing that the small number of unsold auction blocks was a result of the robust and careful design of the auction system. It also ignored record evidence demonstrating that the ability to shift minor amounts of TSG allocation had no impact on the incentive to bid in auctions. The verified record evidence showed that the volume of timber transfers was *de minimis*, and would not have a material impact on a sawmill's need to source timber from auctions.

37. Finally, Commerce failed to examine whether the existence of the log processing requirement in Québec had an impact on auction prices. Québec informed Commerce in its first questionnaire response that there is a log processing requirement in the public forest, but that logs can be exported with authorization, and that there was a blanket authorization in place in two regions along the Ontario border. Québec also submitted expert evidence that demonstrated that there was no viable export market for logs from Crown land. Commerce failed to examine any of this record evidence, and instead, in the Final Determination, and contrary to its findings in previous investigations, found that the auctions could not be market-determined because of the existence of the log processing requirement.

5. New Brunswick

38. Commerce improperly rejected private standing timber prices in New Brunswick as a benchmark on the basis of price distortion, and instead, relied on private prices in Nova Scotia. The evidence demonstrated that reliance on private prices in Nova Scotia as a benchmark was inconsistent with Article 14(d), as these prices did not reflect the prevailing market conditions, or the commercial environment in New Brunswick.

39. Commerce relied on a number of flawed justifications to find that private market prices are distorted in New Brunswick. Indeed, Commerce never established a causal link showing actual distortion in the New Brunswick private stumpage market as a result of the government's purported exercise of market power. As such, it should not have rejected a benchmark based on New Brunswick private market prices.

40. Commerce claimed that New Brunswick's market share—approximately half of the softwood timber market—was a factor showing distortion in the private market. However, New Brunswick is not a predominant supplier of standing timber. Instead, it is only a significant supplier. In these circumstances, evidence pertaining to factors other than government market share was required, as the government's role as a significant supplier cannot, on its own, prove distortion of private prices.

41. Commerce claimed that available, but unharvested, Crown timber created a significant supply "overhang" such that private woodlots were a supplemental source of supply, which distorted market prices by limiting the prices private woodlot owners could charge. This claim is in error. First, Commerce cited no evidence demonstrating that the unharvested Crown timber was economic to harvest. Second, Commerce miscalculated the amount of the "overhang" as 47%. Had Commerce used the correct values in its calculation, it would have determined that only 13.8% of allocated Crown timber in New Brunswick was unharvested during the period of investigation. The amount of unharvested Crown timber in New Brunswick—equivalent to approximately 8% of total mill needs—was insufficient for mills to avoid using timber harvested from private woodlots, which accounted for almost 20% of mill purchases.

42. Commerce also theorized that private mills in New Brunswick "suppressed" prices from private woodlots. However, Commerce's theory of private price suppression cannot be reconciled with the evidence.

43. First, the theory is inconsistent with the fact that mills do not participate in the vast majority of private stumpage transactions in New Brunswick. New Brunswick sawmills typically purchase delivered logs harvested from private woodlots, rather than purchase standing timber from private

woodlots. As a result, mills make purchasing decisions based on the total cost of a delivered log rather than based on the stumpage price.

44. Second, Commerce's theory of price suppression ignored evidence that private woodlot owners are highly sensitive to price suppression and will simply choose not to sell if prices fall.

45. Third, Commerce's theory placed significant weight on a 2008 government report. Commerce failed to consider that the report actually indicated that the price of Crown timber used to produce softwood lumber in New Brunswick may have exceeded fair market value. Moreover, the report was out-of-date and the portions of the report that Commerce relied on expressed only theoretical concerns.

46. Finally, Commerce claimed that the dominance of certain consumers of timber in the New Brunswick market created an "oligopsony" that made private woodlots responsive to the price-setting behaviour of private mills. However, Commerce's claims concerning market concentration are not relevant to an analysis under Article 14(d). Market concentration that arises independently of government intervention is simply a prevailing market condition.

D. Commerce's Out-of-Market Benchmarks Are Inconsistent with Article 14(d)

47. Recourse to alternative benchmarks is limited to exceptional circumstances, and requires selecting the most comparable benchmark and making necessary adjustments for differences in prevailing market conditions. Having improperly rejected the use of valid in-market benchmarks, Commerce resorted to benchmarks that did not reflect the prevailing conditions of each regional market. For B.C. Interior, Commerce relied on an out-of-country benchmark derived from Eastern Washington State log prices. For Alberta, Ontario, and Québec, it improperly relied on a Nova Scotia survey of private prices as a benchmark. For New Brunswick, Commerce improperly relied on Irving's private purchases of standing timber in Nova Scotia as a benchmark. In each instance, Commerce's reliance on an out-of-market benchmark was inconsistent with Article 14(d) of the SCM Agreement.

1. Commerce Improperly Used Washington State Log Prices to Derive a Benchmark for the B.C. Interior

48. Commerce relied on Eastern Washington log prices from a survey published by the Washington State Department of Natural Resources to derive a benchmark to assess the adequacy of remuneration for provincial Crown timber in the B.C. Interior. These Eastern Washington log prices did not reflect the prevailing market conditions of the B.C. Interior.

49. Commerce's selection of Eastern Washington log prices as a benchmark relied on two false premises. First, Commerce improperly claimed that forests and growing conditions in Washington State and British Columbia are comparable. Commerce asserted that the species harvested by the B.C. respondent companies matched the species reflected in the U.S. Pacific Northwest, and that the forestry conditions in both regions had not changed since Commerce's previous investigation into softwood lumber. However, the record showed that there are significant differences in the species-mix harvested in each region and that the mountain pine and spruce beetles had a disproportionate impact on the forestry conditions in the B.C. Interior since the last investigation.

50. Second, Commerce incorrectly assumed that log prices are constant across geographic regions. Under Commerce's derived-demand benchmark methodology, this premise was necessary to allow Commerce to treat any difference in log prices—and, consequently, in its derived standing timber prices—as evidence of an alleged subsidy, rather than the result of differences in prevailing market conditions. However, substantial record evidence disproved Commerce's false premise, and several experts explained that, even where logs are of the same species and have similar growing conditions, it is unlikely that they will have the same price because of differences in prevailing market conditions. Commerce improperly rejected evidence establishing that prices differ based on variability in physical characteristics of the logs, differences in local market conditions, and variability in the contractual terms of sale.

51. Commerce compounded the problems of its out-of-country benchmark by failing to make critical adjustments to reflect certain key prevailing market conditions in the B.C. Interior.

52. First, Commerce improperly rejected a set of rigorously developed, dual-scaled conversion factors representative of the species, grade, and conditions of B.C. Interior logs during the period of investigation, in favour of an unrepresentative, single-averaged conversion factor to a different cubic scale system, which reflected the prevailing conditions of logs harvested in Eastern Washington State in 1998. Commerce's conversion factor could in no way accurately translate the volumes of B.C. Interior logs (a significant amount of which were beetle-killed logs) entering the B.C. respondent companies' mills, which resulted in Commerce overstating these log volumes, and artificially inflating its benchmark.

53. Second, Commerce's benchmark overwhelmingly reflected prices paid for high-quality green sawlogs. By failing to adjust for utility-grade and beetle-killed log prices, Commerce failed to accurately benchmark significant portions of lower-quality, lower-valued logs consumed by the B.C. respondent companies.

54. Third, Commerce failed to make the necessary adjustment to account for the actual transaction unit by which standing timber is sold in British Columbia (i.e. the stand).

55. Last, Commerce failed to adjust its derived-demand benchmarks to account for the higher costs to transport lumber from B.C. Interior mills to end-markets.

56. The cumulative effect of Commerce's failure to make these key adjustments is to artificially inflate its benefit calculation. This is contrary to Commerce's obligation under Article 14(d) to use benchmarks that reflected the prevailing market conditions under which the goods are purchased and sold in order to accurately assess the adequacy of remuneration. Had Commerce properly accounted for these factors, it would have found that no subsidy was provided to the B.C. respondent companies.

2. Commerce Improperly Used a Nova Scotia Benchmark to Assess Adequacy of Remuneration

57. By relying on private prices in Nova Scotia to assess the adequacy of remuneration for provincial Crown timber in Alberta, Ontario, and Québec, Commerce failed to acknowledge that Nova Scotia has a distinct regional market for standing timber. It also refused to acknowledge, much less make any adjustments based on, the prevailing market conditions in Nova Scotia, which are fundamentally different from the market conditions in each of the other provinces.

58. Nova Scotia has a regional market for standing timber that is distinct from the regional markets in Alberta, Ontario, and Québec. Commerce failed to recognize that the interaction of supply and demand for provincial Crown timber in these provinces occurs in geographically and jurisdictionally circumscribed areas of economic activity. First, the provinces maintain laws, regulations, and policies that influence the markets for standing timber. In particular, the provinces are responsible for the legal and regulatory framework for forestry in accordance with Canada's Constitution. Second, the degree to which a market is limited by geography will depend on the product itself and its ability to be traded across distances. The good in question, standing timber, is an immovable resource, and trees necessarily grow and come to market in different ways in different geographic regions. Nova Scotia standing timber is not sold outside of the province. There is also no record to support the premise that harvested logs can be economically transported long distances from Nova Scotia. Accordingly, the market for standing timber in Nova Scotia does not extend beyond this province.

59. Commerce's conclusion that its Nova Scotia benchmark was appropriate to measure subsidization lacked an evidentiary basis. There was extensive evidence before Commerce demonstrating that its private prices from Nova Scotia do not reflect the prevailing market conditions in the other provincial markets. By failing to adequately analyze the prevailing market conditions in each market, Commerce failed to determine whether it was imposing a countervailing duty on the basis of market differences, rather than subsidization.

60. First, Nova Scotia's forest is not comparable to the forests of Alberta, Ontario, or Québec. The Nova Scotia forest is subject to different climate and growing conditions. Moreover, the Nova Scotia species mix differs significantly from the species mix in each of Alberta, Ontario, and Québec. These differences affect harvesting, transportation, and processing costs, and the value of standing timber.

61. Second, despite acknowledging that tree diameter was critical to an assessment of whether the Nova Scotia benchmark was appropriate, Commerce lacked the record evidence required to conclude that the diameter of softwood standing timber included in the Nova Scotia benchmark was sufficiently similar to the diameter of standing timber harvested from Crown lands in Alberta, Ontario, and Québec. The diameter data for Nova Scotia did not measure harvested trees or those processed into sawtimber, while the diameter figures for Alberta and Ontario were those of harvested trees. In addition, Commerce failed to consider that more of the timber harvest (and thus, more smaller-diameter timber) is processed in sawmills in each of Alberta, Ontario, and Québec, as compared to Nova Scotia.

62. Third, Commerce's Nova Scotia benchmark only included Nova Scotia "sawlogs" and "studwood". While Commerce claimed that it was comparing logs used by sawmills to make lumber in each jurisdiction, it failed to take into account that timber with the same characteristics is used differently in different markets. The evidence demonstrated that timber with the same characteristics as the timber purchased and processed into lumber by the respondent companies in Alberta, Ontario, and Québec would have been classified, processed, and priced differently in Nova Scotia. These differences meant that Commerce compared the prices for more valuable timber in Nova Scotia with the prices for less valuable timber in the other provinces.

63. Fourth, Commerce failed to adequately consider the demand of the pulp and paper industry in Nova Scotia. The high demand from pulp mills creates an alternative source of demand for standing timber in the province and fuels the demand for residual chips. Both of these factors increase the value of sawlogs and studwood in Nova Scotia.

64. Fifth, Commerce failed to adequately consider transportation costs, both from harvest to mill and from mill to market. Transportation costs dictate what harvesters are willing to pay for standing timber and are a critical market condition in standing timber markets.

65. Last, Commerce failed to properly consider and account for supply limitations in the Nova Scotia standing timber market.

66. Commerce was obligated under Article 14(d) to properly investigate, collect evidence, and then support its choice of benchmark with record evidence. Instead, it improperly criticized the Canadian parties for failing to provide sufficiently detailed information on the Nova Scotia market that quantified differences in market conditions. However, the Canadian parties presented expert economic evidence of differences between the Nova Scotia market and the markets in the other provinces. This evidence was effectively ignored by Commerce because it was not collected in the ordinary course of business. Accordingly, Commerce placed an impossible burden on the Canadian parties to provide detailed quantitative information on the Nova Scotia market that neither the respondent companies, nor the provinces, prepare or collect in the ordinary course of business.

67. Commerce's reliance on this benchmark was also inconsistent with its obligations under Articles 14 and 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 because it failed to meet the basic requirements of a benchmark used to measure the amount of subsidy: reliability, accuracy, transparency, and adequate explanation.

68. Commerce had an obligation to solicit information regarding its chosen benchmark. Instead, Commerce simply accepted Nova Scotia's survey [[***]]. It chose to ignore that the survey had methodological flaws and was missing key information.

69. First, there was no indication that the Nova Scotia survey was representative of the private market in Nova Scotia.

70. Second, the Nova Scotia survey appears to have included multiple types of transactions, including lump-sum transactions and transactions including non-stumpage costs.

71. Third, the survey excluded pulpwood transactions. Pulpwood was defined based on the "intended use" of timber, yet Commerce had no indication of how the survey respondents understood the vague product definitions, or whether the definitions were uniformly applied. Moreover, by excluding pulpwood, which is found in the same stands (and often the same trees) as sawtimber, Nova Scotia's survey did not provide Commerce with the information necessary to consider the prevailing market conditions for softwood standing timber in Nova Scotia.

72. Finally, the Nova Scotia survey converted responses reported in tonnes to cubic metres using a conversion factor that tended to understate the volumes actually purchased by survey respondents. This understated conversion factor led Commerce to make an imprecise calculation of benefit.

E. Commerce Failed to Consider the Full Remuneration Paid by Producers in Alberta, Ontario, Québec, and New Brunswick

73. During the investigation, the Canadian parties demonstrated that the remuneration Alberta, Ontario, Québec, and New Brunswick (the "four provinces") received from harvesters in exchange for the right to harvest Crown timber included an administered price, mandatory charges, and in-kind costs, such as forest management planning, silviculture, and road building. Commerce has repeatedly acknowledged this remuneration in previous softwood lumber investigations—and, in this investigation, with respect to B.C.—by taking mandatory charges and in-kind costs into account in its assessment of the adequacy of remuneration. However, Commerce ignored the evidence, departed from its past practice, and erroneously found that the remuneration for Crown timber in the four provinces was limited to the administered portion of the price.

74. Commerce alleged that it was justified in ignoring any component of the remuneration that was not also included in its Nova Scotia "pure" stumpage price benchmark. This is illogical and has no basis in Article 14(d). Commerce was first required to calculate the full remuneration for Crown timber by taking into account all monetary and in-kind costs incurred by the respondent companies in exchange for the right to harvest Crown timber, and then to compare this full remuneration to any benchmark. This is because, in a benefit assessment under Article 14(d), an investigating authority must determine whether a recipient has been made better off by the provision of a good. It would be impossible to determine if a recipient is better off if any part of the remuneration were ignored. Commerce therefore erred by refusing to consider, as remuneration, mandatory charges and in-kind costs simply because these costs were not incurred in its benchmark jurisdiction.

75. Commerce also asserted that it was justified in ignoring costs that were billed separately, and costs that governments purportedly did not take into account when setting the administered portion of the provincial Crown stumpage prices. It is irrelevant that certain costs are included in different invoices or as separate line items, or whether governments expressly took into account certain components of the remuneration when setting the administered price. Neither Commerce nor the United States provided any evidence to support the contention that these distinctions are significant. Moreover, Commerce simply ignored record evidence that demonstrated that provinces did take certain mandatory charges and in-kind costs into account when setting their administered prices.

76. Finally, Commerce's attempts to distinguish its past practice are unavailing. Commerce always took into account all costs assumed under the Crown tenure agreement and costs that are necessary to access the standing timber for harvesting. This is indeed what Commerce was required to do. But, in the Final Determination, in the case of the four provinces, Commerce completely turned its back on the evidence, its past practice, and the United States' obligations under Article 14(d) of the SCM Agreement.

F. Commerce Improperly "Set to Zero" the Results of Certain Comparisons Used to Calculate Benefit

77. Commerce failed to assess adequacy of remuneration for New Brunswick and British Columbia Crown standing timber in relation to prevailing market conditions in a manner consistent with Article 14(d) when it set certain negative comparison results to zero. Consistent with the *chapeau* of Article 14 and Article 14(d), determining whether the provision of a good was made for less than adequate remuneration is an inherently fact-intensive exercise that must occur on a case-by-case basis. The method used to determine adequacy of remuneration in relation to prevailing market conditions must reflect the specific characteristics of the good in question.

78. When the good in question is heterogeneous, and transacted in a large volume of line items, over long periods of time (like standing timber), the assessment is likely to be more complex than where the good in question is relatively homogenous. As a result, the focus should be on the "careful matching" that the panel in *US – Anti-Dumping and Countervailing Duties (China)* explained that Article 14(d) requires. "Careful matching" must be understood more broadly than the United States

posits. Contrary to the U.S. arguments, Canada's claim is not one for "offsets"; instead, it is a claim for an accurate assessment of the adequacy of remuneration for Crown standing timber in New Brunswick and British Columbia, which Commerce failed to carry out.

79. For New Brunswick, Commerce selected a monthly average benchmark that took into account a range of transaction conditions. It then compared individual transactions from New Brunswick, which represented a specific set of transaction conditions, to the average. Commerce then removed the transactions that reflected the best transaction conditions through its next methodological step of setting those comparison results to zero. That left Commerce with only the transactions with the worse-than-average-transaction conditions, the full difference of which it counted as a "benefit". By removing the transactions with better-than-average-transaction conditions from its assessment, Commerce ensured that it was not isolating as much as possible any difference in price caused by subsidization. It therefore failed to accurately assess the adequacy of remuneration for Crown timber in accordance with Article 14(d).

80. For British Columbia, Commerce selected an annual, species-specific average benchmark from Eastern Washington. British Columbia sets a single stumpage rate for each transaction that Commerce examined, based on the blend of species in, and other characteristics of, the stand. The unit of transaction in B.C. is the stand. Commerce rejected the use of actual transactions involving stands, and required the respondent companies to deconstruct the transaction unit and report invoice line-items that reflected stand-as-a-whole prices. Commerce then claimed that these were "species-specific" prices, which it compared to its individual species benchmark prices. It then removed the sub-parts of transactions that appeared to show a "benefit" by setting their comparison results to zero. But by removing the comparison results of sub-parts of the transactions, Commerce altered the actual price the respondent companies paid for the transaction—i.e. the stand—and ensured that it could not accurately assess the adequacy of remuneration for Crown timber as it is sold in British Columbia, in contravention of Article 14(d).

81. Commerce had an obligation to determine the "precise amount" of the subsidy.[8] By using methodologies in its investigation that set certain comparison results to zero, Commerce imposed countervailing duties in excess of the amount of the subsidy found to exist in a manner inconsistent with Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994. Inconsistent with Article 19.3 of the SCM Agreement, those countervailing duty amounts were not "appropriate". As a result of its errors, Commerce failed to establish the existence of a benefit as required by Article 1.1(b).

II. COMMERCE IMPROPERLY TREATED THE LOG EXPORT PERMITTING PROCESS FOR B.C. LOGS AS A COUNTERVAILABLE SUBSIDY

82. Commerce incorrectly treated the federal and provincial LEP process for B.C. logs as a countervailable subsidy. Commerce's finding that the LEP process constituted an indirect financial contribution to the B.C. respondent companies, and its subsequent imposition of countervailing duties on a measure that could not constitute a subsidy, were inconsistent with Articles 1.1(a)(1)(iii) and (iv), 19.3, and 19.4 of the SCM Agreement.

83. The LEP process for B.C. logs does not meet the "entrustment or direction" test set out in Article 1.1(a)(1)(iv) because it neither gives responsibility to, nor constitutes an exercise of authority over a private body to carry out the government function of providing logs. Contrary to Commerce's finding, the LEP process does not require a log seller to provide a log to anyone. Nor is the provision of logs a function that would normally be vested in the Governments of British Columbia or Canada, or a practice that, in no real sense, differs from practices normally followed by governments.

84. The crux of the U.S. theory of entrustment or direction is that an alleged limitation on a private body's ability to export a good is equivalent to entrustment or direction to provide that good. However, the panels in *US – Export Restraints* and *US – Countervailing Measures (China)* were confronted with this precise argument, and both rejected it. The Appellate Body, and every other panel considering the issue of entrustment or direction, have agreed that entrustment or direction "does not cover 'the situation in which the government intervenes in the market in some way'".[9] As

[8] Appellate Body Reports, *US – Washing Machines*, para. 5.279; *US – Countervailing Measures on Certain EC Products*, para. 139; and *US – Carbon Steel (India)*, para. 4.152.

[9] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, para. 114.

the panel in *US – Export Restraints* correctly observed, under the U.S. approach, the existence of a financial contribution in the case of an export restraint depends entirely on the reaction of the producers of the restrained good and, specifically, on the extent to which they increase their domestic sales of the restrained product because of the restraint. This unacceptable effects-based approach is the one that Commerce took here, and one that this Panel should reject.

85. Finally, Commerce erred by initiating an investigation into the LEP process without sufficient evidence of a financial contribution, in contravention of Articles 11.2 and 11.3 of the SCM Agreement. The Petition's allegations were predicated on the mere existence of the LEP process and its alleged suppressing price impact on logs in the province. As a result, there was insufficient evidence of a financial contribution.

III. COMMERCE ERRED IN TREATING CERTAIN REIMBURSEMENTS AS COUNTERVAILABLE SUBSIDIES

86. Québec and New Brunswick paid Resolute and Irving, respectively, for certain silviculture and forest management services provided by those companies. Commerce erred by finding that these payments were financial contributions in the form of grants under Article 1.1(a)(1)(i) of the SCM Agreement.

87. Commerce failed to properly scrutinize the design and operation of Québec's Partial Cut Investment Program ("PCIP") and New Brunswick's license management and silviculture payments. The Appellate Body has found that "in the case of grants, the conveyance of funds will not involve a reciprocal obligation on the part of the recipient".[10] A purchase is the opposite: it requires the exchange of consideration. The evidence before Commerce showed that the payments made by Québec and New Brunswick involved a reciprocal obligation on the part of Resolute and Irving, and that those companies provided services in exchange for the payments. As purchases of services, the payments were not financial contributions under Article 1.1(a)(1) of the SCM Agreement.

88. Furthermore, the PCIP, license management, and silviculture payments could not have conferred a benefit on either Resolute or Irving under Article 1.1(b) of the SCM Agreement. By looking only at the cost to the government of the PCIP, license management, and silviculture payments, Commerce failed to consider the added costs incurred by Resolute and Irving through the relevant transactions.

89. As a result of Commerce's mischaracterization of the PCIP, license management, and silviculture payments as grants, and its failure to take into account the reciprocal nature of the relevant transactions, it failed to levy a countervailing duty in the appropriate amount, pursuant to Article 19.3, and levied a countervailing duty in excess of the amount of any, unproven, subsidy, pursuant to Article 19.4.

IV. COMMERCE INCORRECTLY DETERMINED THAT ELECTRICITY PROGRAMS CONFERRED A BENEFIT

90. Commerce incorrectly determined that provincial Electricity Purchase Agreements ("EPAs") in British Columbia and Québec, and the Large Industrial Renewable Energy Purchase Program ("LIREPP") in New Brunswick, conferred benefits on four respondent companies.

91. For British Columbia and Québec, Commerce improperly rejected benchmarks from within the specific electricity markets it was assessing, which reflected the prevailing market conditions of BC Hydro and Hydro-Québec's wholesale purchases of biomass-based electricity. Commerce relied instead on the blended, all-sources retail rates at which BC Hydro and Hydro-Québec sell electricity to consumers to assess whether their purchase of electricity through the EPAs was made for more than adequate remuneration. The retail rates did not reflect the prevailing market conditions of the biomass-based electricity that the respondent companies sold to BC Hydro and Hydro-Québec. Further, in British Columbia, Commerce failed to recognize that three of the four EPAs did not require a benchmark, since the terms and conditions of the sales were based on market principles. It also improperly treated the "turn-down" payments that Tolko received as grants, rather than as part of BC Hydro's purchase of electricity under the Armstrong EPA. As a result, Commerce incorrectly

[10] Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 617.

determined the existence and amount of a benefit in contravention of Articles 1.1(b) and 14(d) of the SCM Agreement.

92. The Appellate Body explained in *Canada – Renewable Energy / Canada – Feed-in Tariff Program* that the benefit analysis in the electricity context should be based on a benchmark in the relevant market reflecting prices that can be obtained by the generating company for the specific type of electricity at issue, rather than on a benchmark reflecting prices for all sources of electricity. The benefit comparison for a particular type of electricity, such as wind, solar, or biomass, must be made in relation to "[…] the terms and conditions that would be available under market-based conditions"[11] for that specific type of electricity, taking the government's chosen supply mix as a given. This is because the definition of a certain supply-mix by the government cannot *in and of itself* be considered as conferring a benefit because "there would not be a market if the government had not created it".[12] To achieve the proper result, the Appellate Body further explained that, when assessing whether a government has purchased electricity for more than adequate remuneration, the first analytical step is to define the relevant market from which to select an appropriate benchmark.

93. In direct contradiction of the Appellate Body's finding, Commerce failed to perform any market analysis at all, improperly assuming that there was only one market in each of British Columbia and Québec. However, the record established that the retail and wholesale markets for electricity are distinct, and that, within the wholesale market in which BC Hydro and Hydro-Québec purchase electricity, there are distinct markets for biomass-based electricity that British Columbia and Québec created based on their definition of the supply-mix. Accordingly, at the outset, Commerce ensured that its benchmarking analysis could not be consistent with the SCM Agreement.

94. Commerce then failed at the second analytical step the Appellate Body identified in *Canada – Renewable Energy / Canada – Feed-in Tariff Program*: to assess the conditions in the relevant market under which the goods would be exchanged and to establish a proper market benchmark. In British Columbia, Commerce failed to examine the terms and conditions of West Fraser's EPAs and Tolko Armstrong's EPA and compare them to those available in the market at that time. It further improperly rejected the prices resulting from the Bioenergy Phase I Call for Power as an appropriate benchmark for the specific type of electricity at issue. Similarly, in Québec, Commerce improperly rejected the Merrimack benchmarking study, which assessed renewable energy prices, including biomass.

95. For New Brunswick, Commerce improperly characterized LIREPP as a financial contribution to Irving in the form of revenue foregone, rather than as a purchase of electricity under Article 1.1(a)(1)(iii). Commerce failed to thoroughly scrutinize the measure "[…], both as to its design and operation and identify its principal characteristics".[13] Had Commerce properly scrutinized the program, it would have found that there was an exchange of rights and obligations, and consideration within the transaction.

96. No revenue was foregone by New Brunswick. NB Power paid for the electricity it purchased from the Irving entities at the renewable electricity rate. No additional payment or funding was provided. The proof that Commerce's analysis is fundamentally flawed is that to avoid the "revenue foregone" claim, NB Power could simply pay the Irving affiliates for its purchases of electricity instead of compensating them with a credit applied to their electricity bill, and the entire rationale for the revenue foregone analysis would disappear.

97. Commerce's error meant that it necessarily failed to properly assess the alleged benefit to Irving through the lens of an Article 14(d) adequacy of remuneration analysis.

V. COMMERCE FAILED TO ASCERTAIN THE PRECISE AMOUNT OF SUBSIDIES ALLEGEDLY CONFERRED BY ELECTRICITY PROGRAMS

98. Even if the Panel accepts that Commerce's claims that the purchase of electricity by BC Hydro, Hydro-Québec, and NB Power conferred a benefit, Commerce failed to ascertain the precise amount of the subsidies allegedly conferred by these provincial electricity programs that were attributable

[11] Appellate Body Reports, *Canada – Renewable Energy/Canada – Feed-in-Tariff Program*, para. 5.190.
[12] Appellate Body Reports, *Canada – Renewable Energy/Canada – Feed-in-Tariff Program*, para. 5.188.
[13] Appellate Body Reports, *Canada – Renewable Energy/Canada – Feed-in-Tariff Program*, para. 5.120.

to softwood lumber products, as required by Articles 10, 19.1, 19.3, and 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994.

99. In *US – Washing Machines*, the Appellate Body found that Articles 10 and 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 require an investigating authority to ascertain as precisely as possible the correct amount of subsidy attributable to the product under investigation. The Appellate Body explained that a proper assessment must examine the design, structure, and operation of the investigated program to determine whether the subsidy is connected to, or conditioned on, the production or sale of a specific product.

100. For British Columbia, Commerce improperly attributed the alleged benefit conferred by BC Hydro's EPAs to the production and manufacture of softwood lumber products, when they were attributable to the production of electricity. Record evidence demonstrated that the electricity the companies sold to BC Hydro could not be used in their softwood lumber production facilities because the generation facilities were either not electrically connected to the sawmills, or sold only electricity that was surplus to their operational needs. The evidence also demonstrated that the EPAs were expected to foster or incentivize the production and sale of electricity, in addition to being conditioned on, and connected to, the sale of biomass-based electricity.

101. For Québec, Commerce erroneously attributed alleged subsidies conferred by the PAE 2011-01 program to Resolute's total sales, including to the production of softwood lumber. But any alleged subsidies could only be tied to pulp and paper production, and could not have been countervailed in this investigation. The Resolute facilities at issue do not, and cannot, produce softwood lumber.

102. For New Brunswick, Commerce improperly attributed part of the alleged benefit from LIREPP to softwood lumber when the program was explicitly tied to the production of pulp and paper. New Brunswick designed the program in such a way that one of its objectives was to bring the electricity costs of Irving's and Irving Paper Limited's paper facilities in line with those of pulp and paper producers in other Canadian provinces. The Target Reduction Percent, which serves as a cap on the purchases of biomass electricity by NB Power, and the Net LIREPP credit, were expressly calculated for this purpose. Accordingly, to the extent that a benefit was conferred, it was tied to non-subject merchandise, and Commerce erred in countervailing it in an investigation on softwood lumber.

VI. COMMERCE INCORRECTLY FOUND THAT THE CAPITAL COST ALLOWANCE FOR CLASS 29 ASSETS WAS *DE JURE* SPECIFIC

103. Commerce erroneously found that the Accelerated Capital Cost Allowance for Class 29 Assets ("Class 29") was *de jure* specific. In doing so, Commerce misunderstood how the Class 29 deduction operates, and applied the wrong legal test to determine specificity under Article 2.1(a) of the SCM Agreement.

104. Article 2.1(a) provides that a subsidy is specific where an "explicit" limitation restricts access to that subsidy to "certain enterprises". Commerce failed to first show that Class 29 includes a limitation on access to "known and particularized" enterprises or industries. Eligibility for Class 29 is based not on the industries or enterprises claiming the deduction, but on the activities for which machinery or equipment is primarily used. Any company, in any industry, is eligible to claim the tax deduction when it purchases machinery or equipment used for manufacturing or processing. As a result, Class 29 does not contain an "explicit" limitation, and no enterprises or industries are excluded from accessing Class 29.

105. Commerce also erred by finding that eligibility criteria for Class 29 do not constitute "objective criteria" under Article 2.1(b). It is clear that Class 29 is not limited to "certain enterprises" pursuant to Article 2.1(a), and is therefore not specific. It was therefore unnecessary to reach the question of whether eligibility for Class 29 was based on "objective criteria or conditions" under Article 2.1(b). Nevertheless, the criteria governing eligibility for Class 29 are "objective". The criteria are neutral, and do not favour certain enterprises over others. Any enterprise or industry that has assets used for the eligible activities is eligible to depreciate those assets using Class 29. The eligibility for this deduction is automatic. The criteria and conditions for the deduction are clearly spelled out in the *Income Tax Act*, and the Canada Revenue Agency strictly adheres to these criteria and conditions.

106. Commerce also erred by finding that it was not material whether the industries that could be considered to be associated with the activities excluded from Class 29 of the *Income Tax Act* were

eligible for other tax deductions and credits under Class 29. Commerce's finding is inconsistent with Articles 2.1(a) and 2.1(b) the SCM Agreement.

VII. COMMERCE'S APPLICATION OF THE "MARITIMES STUMPAGE BENCHMARK" IS INCONSISTENT WITH ARTICLE 14(D)

107. Commerce's Maritimes Stumpage Benchmark is a measure of "present and continued application" or, alternatively, ongoing conduct, that contravenes Articles 1.1(b) and 14(d) of the SCM Agreement.

108. This Maritimes Stumpage Benchmark measure is attributable to the United States as it relates to Commerce's conduct. The precise content of the measure is that, since 2004, when presented with the need to assess adequacy of remuneration for provincial Crown timber in Alberta, Ontario, or Québec, Commerce has consistently relied on a benchmark based on private prices in the Maritime provinces and treated these prices as if they were an in-market benchmark. In particular, Commerce first refers to its regulations and its benchmark hierarchy, before applying its regulations to find that private prices from the Maritimes are a "tier-one", "in-country" benchmark. Commerce then concludes, irrespective of evidence to the contrary, that its benchmark in the Maritime provinces reflects prevailing market conditions in Alberta, Ontario, and Québec.

109. This measure currently applies and will continue to be applied in the future. The measure was applied in 2004, in the first administrative review in the previous softwood lumber proceedings, in 2005, in a second administrative review, and then in 2006 in the preliminary results of the third administrative review. Although the proceedings were then terminated as a result of the 2006 Softwood Lumber Agreement, the measure was applied again in both the current softwood lumber investigation and the recent *Uncoated Groundwood Paper from Canada* investigation. This sequence leaves little doubt as to how Commerce will act in future: anytime there is a relevant investigation or review, Commerce applies the measure.

ANNEX B-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS
OF THE UNITED STATES

I. INTRODUCTION

1. Canada challenges the determination of the U.S. Department of Commerce ("USDOC") in the countervailing duty investigation of softwood lumber products from Canada. Canada's claims lack any merit. Canada's claims rest on flawed interpretations of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement") and the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"). Canada calls on the Panel to interpret the SCM Agreement and the GATT 1994 in a manner that does not accord with customary rules of interpretation of public international law, contrary to the requirements of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"). When subjected to scrutiny, all of Canada's proposed interpretations of the SCM Agreement simply are not supported by the ordinary meaning of the text of the agreement, in context, and in light of the object and purpose of the agreement.

2. Canada's arguments, to a disturbing degree, rest on misrepresentations and mischaracterizations of the USDOC's determination and the voluminous amount of evidence on which the USDOC relied. Contrary to Canada's assertions, the USDOC did not "ignore" any evidence. Rather, as the United States has explained throughout this panel proceeding, the USDOC took into account all of the information it collected during the course of the investigation and made its determination based on the totality of that evidence. Through this dispute, Canada apparently seeks to have the Panel reweigh the evidence examined by the USDOC and make its own determination that Canadian softwood lumber is not subsidized. Canada's approach is contrary to the DSU because that is not the role that the DSU assigns to WTO dispute settlement panels.

3. In the context of a WTO challenge to a trade remedies determination, it is well established that a WTO panel must not conduct a *de novo* evidentiary review, but instead should "bear in mind its role as *reviewer* of agency action" and not as "*initial trier of fact*". The role of a panel in a dispute involving a Member's application of a countervailing duty measure is to assess "whether the investigating authorities properly established the facts and evaluated them in an unbiased and objective manner". Put differently, the Panel's task in this dispute is to determine whether a reasonable, unbiased person, looking at the same evidentiary record as the USDOC, could have – not would have – reached the same conclusions that the USDOC reached.

4. When the Panel examines the USDOC's determination, the Panel will see that it accords with the requirements of the SCM Agreement, properly interpreted pursuant to customary rules of interpretation; the USDOC provided a reasoned and adequate explanation for its determination; that determination is based on ample evidence; and the USDOC's conclusion in the investigation is one that an unbiased and objective investigating authority could have reached.

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

5. Canada's claims under Articles 1.1(b) and 14(d) of the SCM Agreement are based on a flawed understanding of those provisions. First, as a legal matter, Article 14(d) does not obligate Members to calculate the benefit amount by using prices from certain in-country localities and not others, as Canada has suggested. Article 14(d) provides that the adequacy of remuneration should be determined "in relation to the prevailing market conditions" for the good in question "in the country of provision".

6. Canada's approach is flawed because it substitutes the non-treaty terms "in-market" and "jurisdiction" for words that appear in the text. The language in Article 14(d) that speaks to the geographical scope of that provision is the phrase "in the country of provision". This reference is even further attenuated by the phrase "in relation to". This means that, even if the term "market" (within the phrase "prevailing market conditions") is interpreted as relating to a particular geographical location, that location is the country of provision – not, as Canada suggests, the local

jurisdiction of the authority providing the subsidy. Canada's interpretive approach – relying as it does on non-treaty terms – is contrary to customary rules of interpretation and cannot be accepted.

7. The reference in Article 14(d) to prevailing "market conditions" refers in the first place to market-determined prices, not simply the geographical location of the transactions at issue. As the Appellate Body has found, the relevant question for an investigating authority is "whether proposed benchmark prices are market determined such that they can be used to determine whether remuneration is less than adequate". The primary benchmark, and "therefore the starting point of the analysis in determining a benchmark for the purposes of Article 14(d) of the SCM Agreement, is the prices at which the same or similar goods are sold by private suppliers in arm's-length transactions in the country of provision".

8. Indeed, the Appellate Body has been clear that "in-country prices [that] are market determined ... would necessarily have the requisite connection with the prevailing market conditions in the country of provision that is prescribed by the second sentence of Article 14(d)". Where an investigating authority has selected as a benchmark a private, market-determined price for the good in question from within the country of provision, and has provided a reasoned and adequate explanation for its selection, the investigating authority's determination satisfies the terms of Article 14(d).

Comparability of Nova Scotia Benchmark Prices

9. Canada takes the position that Nova Scotia prices cannot serve as a benchmark under Article 14(d) even though these are private, market-determined prices for the good in question within the country of provision. With respect to comparability, Canada has failed to show that the spruce, pine, and fir ("SPF") timber in Nova Scotia is different or incomparable to timber in the other relevant provinces. As a matter of fact, the evidence of record demonstrated that SPF timber was treated as a single category for data collection and pricing purposes by provincial governments. In Alberta, Ontario, and Quebec, the provincial governments charge a single, basket price for Crown-origin standing timber that falls within the SPF species category. And for New Brunswick, of course, Canada does not dispute that the stumpage market in Nova Scotia reflects prevailing market conditions in New Brunswick.

10. In all four provinces and in Nova Scotia, the forests are dominated by species in the same SPF basket, which grows in Nova Scotia and was "the primary and most commercially significant species reported in the species groupings" for Alberta, Ontario, and Quebec. The USDOC found that the SPF species' share of the Crown-origin standing timber harvest volume was 99 percent in Alberta, 94 percent in New Brunswick, 67 percent in Ontario, and 81 percent in Quebec, and also was "by far the predominant group of trees harvested in Nova Scotia". And when the USDOC verified the company respondents, the companies' transaction data demonstrated that SPF species "continue to be the dominant species that grow in all [three] provinces". The decision to treat SPF species as a basket cannot be grounds for a finding of inconsistency when it mirrors the treatment by provincial governments of those species (and products made from those species) as being interchangeable.

11. In addition to (and consistent with) this evidence, the USDOC found that Nova Scotia stumpage prices reflected prevailing market conditions in Alberta, Ontario, and Quebec because the average diameter at breast height ("DBH") of the SPF standing timber in Nova Scotia and New Brunswick was comparable to the same measurement in Alberta, Ontario, and Quebec.

12. An objective and unbiased investigating authority could have found on this basis – as the USDOC did here – that Nova Scotia timber was comparable to timber in the relevant provinces, and that the Nova Scotia stumpage market reflected the prevailing market conditions in Canada, inclusive of these provinces. Likewise, an unbiased and objective investigating authority could have considered, as the USDOC did, that in-country, market-determined Nova Scotia benchmark prices have the requisite connection with the prevailing market conditions in the country of provision to which the second sentence of Article 14(d) refers.

13. Canada's argument about regional markets is not supported by the text of Article 14(d), and the United States has demonstrated why Canada's contention is unavailing. Canada argues that the relevant market conditions "vary significantly" across even the smallest distances, *e.g.*, "even at the level of individual mills located within the same state, owned by the same company, and within an hour and a half haul of each other". Canada has offered a litany of even more minute considerations

that, in its view, make for different conditions on a tree-by-tree basis. But Canada's proposition implies that there may be no appropriate basis upon which to delineate between conditions in one region and another. If one accepts Canada's proposition, then the only remaining basis for designating each province as its own "market" is that each provincial government sets different pricing policies within its jurisdiction. And ultimately, the provincial stumpage pricing policies do not constitute "prevailing market conditions" within the meaning of Article 14(d).

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

15. Moreover, accepting Canada's position would amount to allowing the government to both provide the subsidy and determine for itself whether it received adequate remuneration. But the Appellate Body rejected this argument when Canada took a similar position in *Canada – Aircraft* with respect to Article 1.1(b). It is not for the provider of the subsidy but rather for the market to determine what the value of the input is. And here, the private, market-determined prices from Nova Scotia served as an appropriate in-country basis for that comparison. The Panel should reject Canada's claim on this basis alone.

16. With respect to the reliability of the private stumpage survey prices, Canada has failed to demonstrate that the Nova Scotia data is unreliable. Canada has also failed to demonstrate that any adjustments were necessary for the Nova Scotia benchmark. What Canada is really arguing is that the selected benchmarks are not comparable to the input at issue. But Canada's arguments on comparability fail because the USDOC relied on benchmarks that are, in fact, comparable to the input at issue. Canada's argument reflects Canada's misunderstanding of the relevant inquiry under Article 14(d) of the SCM Agreement. In essence, Canada argues that a proper benchmark price should be established based on consideration of the purchaser's "willingness to pay" (*i.e.*, taking into account the subsidy recipient's full range of financial or economic circumstances) – rather than based on observed actual transaction prices that other producers paid to obtain the good in question on the market, as opposed to obtaining the good from the government. Nothing in the text of Article 14(d) of the SCM Agreement supports the approach for which Canada argues.

Province-Specific Arguments

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

18. Government-owned timber makes up the majority of the softwood timber harvest in each of the five provinces at issue, accounting for 90 percent or more of the harvest in most of these provinces. But the mere fact of predominance, even at levels as high as 90 percent or more – was not the sole basis for the USDOC's determinations. It is uncontested that these provincial governments play a predominant role as suppliers of stumpage rights, providing the majority of the SPF timber in each province. But in addition, the USDOC identified and evaluated a number of additional factors that serve to bring about the distortion of potential benchmarks, such that those prices cannot be considered market-determined prices for the purposes of the comparison under Article 14(d).

19. Canada argues that the USDOC's determination to use private prices from Nova Scotia is inconsistent with Article 14(d) of the SCM Agreement because, according to Canada, the USDOC did not meet the standard the Appellate Body has applied for out-of-country benchmarks. Canada's argument is based on the wrong legal standard. That standard does not apply here and, as a result, Canada cannot demonstrate any inconsistency with Article 14(d) on this basis. This is reason alone for the Panel to reject this claim by Canada in relation to Article 14(d), and the Panel need not continue to evaluate it further.

20. Even aside from this flaw in Canada's argument, Canada's claim would fail for the additional reason that the USDOC's explanation in fact addressed each of the considerations with regard to the distortion analysis in each province for which the USDOC used the Nova Scotia benchmark. The USDOC conducted a thorough investigation, provided a reasoned explanation for its findings with respect to all four provinces, and in each case reached a conclusion that any objective and unbiased investigating authority could have reached.

New Brunswick

21. With respect to New Brunswick, the USDOC found that Crown timber accounted for the majority of the market, and approximately 55 percent of the provincial harvest during the relevant period. Among other things, the USDOC took into account several reports by a New Brunswick forest task force and the provincial Auditor General, in which these officials reported that consumption of Crown-origin standing timber by sawmills is concentrated among a small number of corporations and that those same corporations also dominate consumption of standing timber harvested from private lands. The leverage of these private mills as dominant consumers, according to the official reports, suppresses prices from private woodlots, and in turn those suppressed private prices lead to an artificially low price for Crown stumpage, which is set by the province based on private stumpage prices. The Auditor General concluded – and the USDOC took note – that "the [stumpage] market is not truly an open market," and that "it is not possible to be confident that the prices paid in the market are in fact fair market value". For all of the reasons the United States has given, an unbiased and objective investigating authority could have reached the conclusion – as the USDOC did – that there were no market-determined private prices for stumpage in New Brunswick that could be used for benchmarking purposes.

Ontario

22. With respect to Ontario, the USDOC found that Crown timber accounted for more than 96 percent of the harvest volume in the province during the relevant period. The USDOC found that Ontario administratively set prices based on three components, only one of which considered market conditions (namely, the relatively minor estimated forest renewal charge). More than 96 percent of the harvest volume in Ontario is subject to this pricing mechanism. In addition to this price-setting mechanism, the USDOC determined that "the five largest tenure-holding corporations accounted for [more than 92] percent of the allocated Crown-origin standing timber in FY 2015-2016", and that these five organizations were also the dominant purchasers of private-origin standing timber. These companies attained substantial market power over sellers of non-Crown-origin standing timber by virtue of these circumstances. The USDOC concluded that these circumstances, in conjunction with the ability of these tenure-holding corporations to purchase Crown-origin standing timber irrespective of their allocated volume, and to transfer allocated timber between sawmills or to third parties, served to suppress prices of private timber in the province, yielding private timber prices that were not market-determined.

23. Canada argues that, alternatively, the USDOC should have used an Ontario log price benchmark rather than the Nova Scotia stumpage benchmark. However, the log prices proposed as a benchmark by the Canadian parties are not prices for the good in question – that is, stumpage. As such, the log price benchmark is not a market-determined price for the good in question (stumpage) and, given the availability of a stumpage benchmark within Canada, using an alternative approach is not called for in this instance. Having determined that the Nova Scotia stumpage prices served as a suitable benchmark, the USDOC was not obligated to determine the suitability of lesser alternatives such as constructing a benchmark from private log prices in Ontario. For all of the reasons the United States has given, an unbiased and objective investigating authority could have reached the conclusion – as the USDOC did – that there were no market-determined private prices in Ontario that could be used for benchmarking purposes.

Quebec

24. With respect to Quebec, the USDOC concluded that Crown timber accounted for 73 percent of the stumpage harvest during the relevant period. Of this 73 percent, 51 percent was provided directly by the province to producers *via* timber supply guarantees ("TSGs"), and the remaining 22 percent was provided by the government to producers *via* auctions of Crown timber. The USDOC found that using timber supply guarantees, "a sawmill can source up to 75 percent of its supply need at a government-set price", and that 94 percent of TSG-holders did so. The USDOC determined that "there is strong motivation for a sawmill to treat its TSG-guaranteed volume as its primary source of supply and its auction volume as an additional or residual supply source". The ramifications of this arrangement were further amplified by other aspects of the provincial timber policies. These circumstances, the USDOC found, reduced the need of TSG-holding corporations to source from non-allocated sources, such as the provincial auction or from private parties and, because a few major players accounted for the majority of purchase and consumption volumes (for both TSG-allocated timber and auctioned timber), the predominant buyers had both of these provincial timber mechanisms available to influence the auction prices.

25. The USDOC considered whether Quebec's auction system yielded competitive, market-determined prices. The USDOC was concerned with whether the reference price mechanism operated independently of the administered market. The USDOC observed that the record demonstrated that auction prices remained at or marginally above TSG prices and did not demonstrate independence. The USDOC ultimately concluded that Quebec's timber market was distorted, and that its auction mechanism was not "based solely on an open, market-based competitive process" that could yield market-determined benchmark prices suitable for the benchmark comparison. For all of the reasons the United States has given, an unbiased and objective investigating authority could have reached the conclusion – as the USDOC did – that there were no market-determined private prices for stumpage in Quebec that could be used for benchmarking purposes.

Alberta

26. With respect to Alberta, the USDOC found that more than 98 percent of the harvest volume in Alberta was Crown-origin timber provided by the government to lumber producers. The USDOC determined that this evidence reflected "near complete Crown dominance of the market for standing timber in Alberta", and that under these circumstances, "the market ... is so dominated by the presence of the government, the remaining private prices in the country in question cannot be considered to be independent of the government price". Canada argues that the USDOC was unjustified in rejecting derived log-price benchmarks in Alberta. Canada's arguments lack merit. The USDOC provided a detailed explanation of the reasons for its determinations with respect to the log prices Canada put on the record. The USDOC addressed all relevant issues raised by Canada and the respondents in this regard. And the USDOC found that the balance of evidence in this investigation supported its determination to reject the log prices because market-determined, in-country private stumpage prices from Nova Scotia were available in this case and the log prices were not consistent with market principles. For all of the reasons the United States has given, an unbiased and objective investigating authority could have reached the conclusion – as the USDOC did – that there were no market-determined private prices in Alberta that could be used for benchmarking purposes.

British Columbia – Distortion

27. Regarding the USDOC's determination to use an out-of-country benchmark for British Columbia stumpage, Canada has failed to establish that the USDOC erred in determining that prices in British Columbia are not market-determined prices. The USDOC's distortion finding is not inconsistent with Article 14(d) of the SCM Agreement. In this case, the provincial government of British Columbia owns over 94 percent of the land, and 90 percent of the timber harvested during the period of investigation came from provincial Crown land. As a result of its investigation, the USDOC determined that it could not use British Columbia prices as a benchmark because the provincial government's predominance in the market, combined with the flaws in its auction system, resulted in price distortions that would generate a circular comparison and, therefore, could not serve as a meaningful benchmark. This is the prototypical scenario the Appellate Body described when it discussed the consequences of such predominant government ownership of nearly all the supply of the good in the country of provision. Therefore, BC prices could not serve as a meaningful benchmark. An objective and unbiased investigating authority could have determined – as the

USDOC did – that there were no market-determined in-country private prices for British Columbia stumpage that could be used for benchmarking purposes.

28. The USDOC explained that British Columbia Timber Sales ("BCTS") auction prices, which were the only benchmark proposed by the Canadian respondent interested parties, would present a viable benchmark if the auction mechanism is open and competitive, and thus "actually functions as a market price, and functions independently of the government-set price". The USDOC sought to analyze whether the BCTS auction prices were competitive and open and independent, such that they could provide a benchmark market price for BC stumpage that was not distorted by the government's ownership of the vast majority of harvestable forest land. The USDOC concluded that BCTS auction prices were not competitive, open, and independent because the same dominant firms consumed auctioned timber and purchased the comparatively much larger share of their Crown stumpage inputs under their long-term tenures at prices set by the results of those same auctions. Thus, the USDOC explained that, although the participants in BCTS auctions are primarily independent loggers, the prices paid by these loggers key off prices that the dominant tenure-holding sawmills are willing to pay. Accordingly, BCTS prices are effectively limited by what those tenure holders pay for timber harvested from their tenures.

29. The USDOC determined that BCTS auction prices were not a suitable benchmark because (1) BCTS prices were not independent of prices for timber on the administered portion of GBC-owned land, because the tenure-holding sawmills were also the predominant purchasers of BCTS-harvested timber; (2) BCTS prices were not set by competitive bid procedures, because the three-sale limit on Timber Supply Licenses inhibits competition and suppresses prices; and (3) the GBC's and GOC's restraints on the exportation of BC-origin logs contribute to an overabundant supply of logs and suppresses standing timber prices. The USDOC's distortion finding was not based on mere government presence, but rather on three distinct grounds: auction prices were limited by the Crown stumpage prices paid by dominant tenure-holding firms; a three-sale limit on Timber Supply Licenses that artificially limited the number of bidders in British Columbia's government auctions and created other, additional distortions; and provincial and federal log export restraints suppressed log prices, which impacted stumpage prices. Canada's argument ignores each of these findings that the USDOC made.

30. The selected benchmark – a stumpage benchmark constructed from private log prices in the U.S. state of Washington – is not inconsistent with Article 14(d) of the SCM Agreement because these U.S. log prices reflected private prices for comparable goods consistent with market principles and were properly adjusted to ensure the prices relate to prevailing market conditions for British Columbia stumpage.

31. As the Appellate Body found in *US – Softwood Lumber IV*, the Article 14(d) "guideline does not require the use of private prices in the market of the country of provision in every situation". Rather, "that guideline requires that the method selected for calculating the benefit must relate or refer to, or be connected with, the prevailing market conditions in the country of provision". Although an investigating authority should first consider proposed in-country prices for the good in question, it would not be appropriate to rely on such prices if they are not market-determined as a result of governmental intervention in the market. As these findings indicate, absent from Article 14(d) is any requirement that in-country prices must be used in all situations. Indeed, in many situations, imposing such a requirement would be incompatible with the purpose of Article 14(d), that is, to calculate a benefit in terms of how much better off a recipient is compared to what the recipient would have paid to obtain the good under market conditions.

32. Canada errs in describing the extent to which the use of out-of-country benchmarks is "limited" under the proper legal approach. Prior reports have reasoned that, consistent with Article 14(d), an investigating authority may rely on an out-of-country benchmark when it finds that prices are distorted in the country of provision. As explained, where the government plays a predominant role as a supplier in the market, it is "likely" that private prices for the good in question will be distorted. Although there is no market share threshold above which an investigating authority may conclude *per se* that price distortion exists, the more predominant a government's role in the market, the more likely that role results in distortion of private prices. The circumstances of the underlying investigation present precisely the scenario in which reference to out-of-country benchmarks is contemplated under Article 14(d).

33. The USDOC's analysis is consistent with the type of analysis that has been recognized as appropriate in prior panel and Appellate Body reports. Because of the distortion in the British Columbia stumpage market, the USDOC could not use internal prices to the province to measure the adequacy of remuneration. Furthermore, the USDOC found, and Canada does not dispute, that other timber prices within Canada would not have provided the appropriate benchmark because timber in British Columbia is significantly larger and of greater value for sawmilling than that of other provinces.

British Columbia – Washington Log Prices

34. With respect to the USDOC's determination to rely on a stumpage benchmark derived from Washington log prices, the USDOC's reliance on Washington log prices satisfies the terms of Article 14(d) of the SCM Agreement because those prices reflect private transactions for comparable goods, and the USDOC made necessary adjustments to the log prices to ensure that the resulting stumpage comparison related to prevailing market conditions in British Columbia for stumpage. The USDOC explained that eastern Washington is contiguous with the interior of British Columbia, where three of the mandatory respondents based their operations, and features comparable timber species and growing conditions. Further, the Washington prices reflected private transactions between log sellers and buyers for logs harvested from private lands, and were contemporaneous with the period of investigation, publicly available, species-specific, and prepared in the ordinary course of business by an independent government source. The USDOC derived the benchmark it used in a manner that accounted for the prevailing market conditions in British Columbia by deducting the British Columbia respondents' reported costs for accessing, harvesting, and transporting timber to their sawmills, and other costs obligated under their tenures.

35. The USDOC's reliance on Washington log prices satisfies the terms of Article 14(d) because those prices reflect private transactions for comparable goods, and the USDOC made necessary adjustments to these log prices to ensure that the resulting stumpage comparison related to prevailing market conditions in British Columbia for stumpage. Canada has failed to demonstrate that the USDOC erred in deriving a benchmark from Washington log price data. The selected benchmark derived from private log prices is not inconsistent with Article 14(d) of the SCM Agreement.

36. Canada's arguments regarding conversion factors, dead logs or beetle-killed logs, and utility grade logs are also unpersuasive. Canada argues that the USDOC did not act objectively when rejecting volumetric factors in the BC Dual Scale Study, but the USDOC selected a conversion factor after an examination of the evidence and provided a reasoned explanation for its choice, including the reasons why the USDOC preferred to use data prepared by an impartial government agency in the ordinary course of business rather than data from a study commissioned for the purpose of opposing the USDOC's benchmark calculation. In reviewing the available conversion factors, the USDOC determined that the BC Dual Scale Study was not useable because the authors failed to explain their methodology for selecting the limited number of scaling sites included in the study. The absence of such methodology was of particular concern, because the BC Dual Scale Study was commissioned specifically for use in this investigation. Instead, the USDOC relied upon the only viable conversion factor study on the record, the U.S. Forestry Service study, which was prepared by an impartial government agency in the ordinary course of business.

37. The USDOC closely evaluated the underpinnings of the BC Dual Scale Study, and made an objective and unbiased determination that the study was not reliable. Specifically, the BC Dual Scale Study failed to identify any methodology for its site selection. The USDOC did not suggest that only a single, particular methodology was acceptable, but rather that there be <u>some</u> widely-accepted methodology – *e.g.*, random, stratified, or composite sampling – and not simply the authors' unfettered discretion. The study's assertion that the sites were selected on the basis of personal "historical knowledge" of the trees at those sites does not sufficiently demonstrate that the selected sites are representative or based on any statistically valid sampling methodology. As the USDOC explained, "[t]he structure of a sampling methodology is a key decision point of any sound sampling methodology because how a sample is conducted can minimize bias, maximize the representativeness of the sample result, and inform the statistical relevance to the population".

38. The United States also underscores that Canada has repeatedly changed its characterization of the study's purported methodology. In its first written submission, Canada asserted for the first time that the Dual Scale Study utilized "stratified random sampling". This explanation is absent from

the study and was not provided to the USDOC during the investigation. Then, in its responses to the first set of panel questions, when confronted with a direct question regarding the study's use of stratified random sampling, Canada changed its response and claimed that the study was based on "purposive sampling of scaling sites". If the study did, indeed, clearly identify the sampling methodology, Canada would not need to resort to the type of shifting *post hoc* characterizations of the sampling methodology Canada has presented to the Panel.

39. With respect to adjustments for utility grade logs, the USDOC determined there was no record evidence that would allow it to make a grade adjustment to the Washington Department of Natural Resources ("WDNR") benchmark, because the record did not provide a reliable means of converting between Washington State and British Columbia grades. Canada's contention that the WDNR data did not include beetle-killed prices is not merely speculative, but contrary to the relevant evidence. Undisputed record evidence establishes that beetle infestation exists in the U.S. Pacific Northwest among the same species as in British Columbia, although those species are less prevalent, and Canada's own consultants obtained price quotes for beetle-killed logs from several mills in the United States. Beetle-killed condition, like other quality issues, relates to log grade, and the WDNR benchmark did distinguish between three Washington State grades.

40. An examination of the record demonstrates that the USDOC took into account Canada's arguments on each of these points and provided an explanation for rejecting each one, consistent with the information available on the record. Canada invites the Panel to reweigh these considerations, but Canada has failed to demonstrate that the USDOC reached a conclusion that an objective and unbiased investigating authority could not have reached on the basis of these facts.

The USDOC Conducted a Diligent Investigation

41. Canada's repeated assertion that the USDOC ignored or rejected relevant information is unfounded, as can be demonstrated by looking at the explanations the USDOC itself provided in the preliminary and final determinations and the decision memoranda. The USDOC conducted a thorough investigation and adequately addressed the evidence on the administrative record. Canada's argument (and its chart of reports) relies on gross mischaracterization of how the USDOC addressed the various documents and reports that Canada has identified. The record of the investigation demonstrates that the USDOC considered and addressed the full range of relevant issues raised by the parties. Canada has failed to show – and cannot show – that the USDOC's investigation was deficient. The investigative process and analysis that the USDOC undertook for each province confirms that the USDOC conducted a diligent investigation and solicited relevant facts consistent with its role as an investigating authority. Canada therefore has failed – for this additional reason – to demonstrate that the USDOC's determinations are inconsistent with Articles 1.1(b) or 14(d) of the SCM Agreement.

III. THE USDOC'S DECISION NOT TO PROVIDE OFFSETS FOR NON-SUBSIDIZED TRANSACTIONS IN THE BENEFIT CALCULATION IS NOT INCONSISTENT WITH ARTICLES 1.1(B), 14(D), 19.3, AND 19.4 OF THE SCM AGREEMENT AND ARTICLE VI:3 OF THE GATT 1994

42. Canada claims that the USDOC "used benefit calculation methodologies that improperly 'set to zero' transaction-to-benchmark comparisons where the purchase price for standing timber was higher than the benchmark price" when, Canada contends, "a reasonable and objective investigating authority would not have used a benefit calculation methodology that set certain comparison results to zero". Canada's claims lack merit. Nothing in the covered agreements requires an investigating authority, when determining the amount of the benefit conferred by a financial contribution, to provide offsets or credits for instances in which other financial contributions do not confer a benefit. Per the terms of Article 1 of the SCM Agreement, each time there is a financial contribution and a benefit is conferred, a subsidy is deemed to exist.

43. The very arguments Canada makes in this dispute were rejected previously by the panel in *US – Anti-Dumping and Countervailing Duties (China)*. That panel report, and other prior panel and Appellate Body reports, confirm that Article 14 of the SCM Agreement, through its guidelines, gives Members' investigating authorities discretion to develop appropriate methodologies to calculate the benefit of a subsidy. In particular, nothing in Article 14(d) of the SCM Agreement imposes an obligation on Members to conduct an aggregate analysis, nor does Article 14(d) require Members to

provide offsets or credits in the benefit calculation when a government provides goods for adequate remuneration.

44. Likewise, no such obligation is imposed by Articles 1.1(b), 19.3, or 19.4 of the SCM Agreement, nor by Article VI:3 of the GATT 1994. Canada asserts, but never explains, how a breach of Articles 14(d), 19.3 and/or 19.4 would result in a consequential violation of Article 1.1(b). Such unsupported assertion is wholly insufficient to establish Canada's claim of a breach under Article 1.1(b). Ultimately, it may be prudent for the Panel to exercise judicial economy with respect to Canada's claim under Article 1.1(b), as has been done in prior reports.

45. Canada's arguments concerning Articles 19.3 and 19.4 of the SCM Agreement, and Article VI:3 of the GATT 1994, fail because Canada's proposed interpretation of those provisions would override the text of Article 14 of the SCM Agreement with obligations in other provisions of the SCM Agreement and the GATT 1994 that have no textual connection to the "benefit to the recipient" guidelines set forth in Article 14, and would instead impose a specific and far-reaching obligation when calculating the amount of a subsidy.

46. In addition to having no support in the text of the covered agreements, Canada's proposed interpretation has troubling implications. Because Canada attempts to locate the purported obligation to provide offsets/credits for "negative comparison results" in Articles 19.3 and 19.4 of the SCM Agreement, and Article VI:3 of the GATT 1994, such an obligation, if it were found to exist, would necessarily apply to all of Article 14, and would require that offsets/credits be provided whenever an investigating authority found that any financial contribution did not provide a benefit. Thus, Members would be required to provide offsets/credits across different types of input products and even across different types of subsidies. Canada has not identified any limiting principle that would confine the purported aggregation/offset obligation to particular input subsidies or prevent the obligation, if it were found to exist, from applying across different types of subsidies. As the United States has demonstrated, and as the panel in *US – Anti-Dumping and Countervailing Duties (China)* agreed, there simply is no support in the terms of the covered agreements or in logic for the obligation that Canada asks the Panel to invent.

47. Rather, each time British Columbia and New Brunswick provided standing timber to one of the respondents for less than adequate remuneration, a benefit was conferred, a subsidy was deemed to exist, and, because the subsidized imports were found to be causing injury, the United States had the right to impose a countervailing duty equal to the amount of the benefit conferred. The fact that, at other times, Canadian provinces may have provided standing timber to these firms for adequate remuneration, and therefore no subsidy existed in those instances, is irrelevant. Those non-subsidies could neither eliminate nor diminish the benefits conferred when Canadian provinces provided stumpage for less than adequate remuneration.

48. Canada's arguments that the USDOC was required to provide offsets/credits because of the particular factual circumstances in New Brunswick and British Columbia also fail because Canada's arguments lack any foundation in logic. In reality, the USDOC undertook precisely the kind of "careful matching" of transactions for which Canada argues. Additionally, if the transactions and benchmarks were mismatched, then the solution would be to match them correctly; not require that an investigating authority provide offsets in the aggregation process. If there truly were a mismatch problem, there would still be a mismatch problem if all the results of the mismatched comparisons were just aggregated and averaged. Any such aggregation and averaging and offsetting certainly would not result in the "careful matching" that Canada insists is required. And if the transactions and benchmarks were matched correctly, then certainly it would not be appropriate to provide offsets/credits across different subsidies, as Canada agrees.

49. Late in the panel proceeding, Canada attempted to shift its argument significantly, raising concerns with how the USDOC identified or grouped the transactions under examination in the underlying countervailing duty investigation at issue in this dispute (or "the manner in which the financial contribution is defined"). While a failure by an investigating authority to correctly identify or group the transactions under examination when assessing whether a benefit was conferred (*i.e.*, how the investigating authority defined the financial contribution) could, itself, potentially form the basis for a claim under Article 14(d) of the SCM Agreement, Canada did not make a claim in this dispute about the USDOC's identification or grouping of transactions or its definition of the financial contribution. The new claim that Canada introduced late in the panel proceeding is inconsistent with

Article 6.2 of the DSU because Canada did not raise this claim in its panel request, and thus any such claim is outside the Panel's terms of reference.

50. Ultimately, Canada's claims are based on a misreading of the SCM Agreement and the GATT 1994, a misunderstanding of prior panel and Appellate Body reports, and factual arguments that lack any foundation in logic. Accordingly, there simply is no basis to find that the USDOC's determination of the benefit of government-provided stumpage in New Brunswick and British Columbia is inconsistent with Articles 1.1(b), 14(d), 19.3, and 19.4 of the SCM Agreement, and Article VI:3 of the GATT 1994.

IV. THE USDOC'S DETERMINATION CONCERNING BRITISH COLUMBIA'S AND CANADA'S LOG EXPORT RESTRAINTS IS NOT INCONSISTENT WITH ARTICLE 1.1(A)(1)(IV) OF THE SCM AGREEMENT

51. Canada claims that the USDOC improperly investigated and countervailed British Columbia's and Canada's log export restraints. Canada's arguments are based on a misunderstanding of the SCM Agreement and misrepresentation of the USDOC's determination.

52. The USDOC found that official government action compels British Columbia log suppliers to provide a good – logs – to British Columbia consumers, including mill operators. In other words, as contemplated by Article 1.1(a)(1)(iv) of the SCM Agreement, the USDOC found that the Government of British Columbia and the Government of Canada entrusted or directed private bodies to engage in conduct that is described in Article 1.1(a)(1)(iii) of the SCM Agreement (providing goods), and further found that such conduct would normally be vested in the Governments of British Columbia and Canada, and the practice, in no real sense, differs from practices normally followed by governments.

53. Canada asks the Panel to make a categorical determination that, as a legal matter, export restraints simply cannot constitute entrustment or direction. There is no support in the SCM Agreement for Canada's argument. Article 1.1(a)(1) of the SCM Agreement, when properly interpreted, establishes that the concept of entrustment or direction encompasses a range of government actions, including the imposition by the Governments of British Columbia and Canada of log export restraints as a means by which to entrust or direct private log suppliers to carry out the function of providing logs to BC consumers, including mill operators.

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

55. Canada's reliance on the panel reports in *US – Export Restraints* and *US – Countervailing Measures (China)* is misplaced. The statements in the *US – Export Restraints* panel report to which Canada refers are *obiter dicta* concerning a hypothetical measure. The legal reasoning underlying that panel's statements has been thoroughly repudiated by other panel and Appellate Body reports. And that panel's interpretation of Article 1.1(a)(1)(iv) is contrary to customary rules of interpretation. The *US – Countervailing Measures (China)* panel expressly limited its findings to the facts before it, and those facts differ from the facts in the underlying investigation. So, those panel reports simply provide no support for Canada's arguments.

56. The ample record evidence that was before the USDOC supports the USDOC's determination of entrustment or direction and supports the USDOC's determination that providing logs is a type of function that would normally be vested in the Governments of British Columbia and Canada. After examining the record evidence, the USDOC found that the log export restraints require in-province processing of wood fiber, subject to exemption only if British Columbian timber processing facilities do not need or cannot economically use the input material, or if the material would otherwise be wasted. On this basis, the USDOC found that official government action compels suppliers of BC logs to supply to BC customers.

57. This is not a case where the government's intent to assist downstream industries is hidden or implicit, and discoverable only upon studying the effects of the policies. Rather, the express purpose of Canada's and British Columbia's laws is that private log suppliers will provide to in-province mill operators all the input material that mills need and/or can economically use. Specifically, the laws single out "timber processing facilities in British Columbia", and prioritize their supply, to the exclusion of consumers in export markets. Therefore, the USDOC correctly concluded that log harvesters are required to "to divert to mill operators some volume of logs that could otherwise be exported".

58. The USDOC did not take an effects-based approach to its analysis of British Columbia's log export restraints, as Canada falsely asserts. Canadian interested parties introduced effects-based arguments by asserting that the log export restraints have no effect. The USDOC examined evidence on the administrative record and determined that the assertions of the Canadian interested parties lacked foundation or otherwise were insufficient to change the conclusion that the USDOC drew from its examination of the laws and regulations that govern the provision of logs within British Columbia.

59. The USDOC also found that logs are harvested from standing timber in forests, and the province of British Columbia controls over 94 percent of all forest land within its boundaries, which demonstrates its near total control over the timber supply. Where the government owns a resource, such as standing timber, the exploitation of that resource necessarily is, for that government, a function that would be vested in that government.

60. The USDOC's decision memoranda speak for themselves, so the Panel does not need to rely on characterizations of those documents made by Canada, or even those made by the United States. It is clear from a review of those memoranda that the USDOC's explanation of its determination is "reasoned and adequate", the USDOC's determination, which is based on the totality of information on the administrative record, is supported by ample evidence, and an unbiased and objective investigating authority, examining the same evidence, could reach the same conclusions that the USDOC reached.

61. Finally, Canada's flawed claims regarding the USDOC's initiation of a countervailing duty investigation of the log export restraints likewise lack any foundation, because they simply refer to and depend upon Canada's flawed arguments that the log export restraints do not result in a financial contribution as a matter of law or fact.

V. THE USDOC'S DETERMINATIONS REGARDING GRANTS PROVIDED FOR SILVICULTURE AND FOREST MANAGEMENT ARE NOT INCONSISTENT WITH ARTICLES 1.1(A)(1)(I), 1.1(B), 14(D), 19.3, AND 19.4 OF THE SCM AGREEMENT

62. Canada alleges that silviculture and forest management payments to JDIL and Resolute provided by New Brunswick and Quebec constitute "purchases of services" and thus cannot be considered a "financial contribution" under Article 1.1(a)(1) of the SCM Agreement. Canada also argues that no benefit could have been conferred as a result of the payments. Canada's arguments lack merit.

63. Governments generally establish through laws and regulations a host of obligations that businesses must comply with as part of their operational costs of doing business. The performance of such an obligation by a business normally cannot be considered voluntary or reciprocal, because business operations conducted in the absence of this performance would likely violate the law or regulation that established the obligation.

64. JDIL and Resolute both chose to harvest trees from Crown lands. Both JDIL and Resolute were legally obligated to satisfy certain silviculture requirements as a condition for access to Crown stumpage. Both companies received payments from the government – financial contributions in the form of a direct transfer of funds – that alleviated some of the costs associated with these silviculture and forest management requirements.

65. JDIL and Resolute had no choice about whether to enter into these transactions or not. Therefore, these transactions did not involve the action or an act of buying silviculture and forest management or buying the use of a partial cutting technique. The companies' performance of these legally-required obligations also cannot be considered voluntary or reciprocal, because they would

have violated the law (or the terms of a forest management agreement) if they had harvested timber without performing these obligations.

66. Finally, it is indisputable that JDIL and Resolute were "better off" than they otherwise would have been absent the provincial silviculture and forest management payments. As the panel in *EC – Large Civil Aircraft* reasoned, "where a subsidy takes the form of a grant, the amount of the financial contribution and the amount of the benefit are the same". The silviculture and forest management payments thus conferred a benefit in the full amount of the payments because the payments intrinsically made JDIL and Resolute better off than they would otherwise have been absent the payments.

67. The USDOC's conclusion that the payments for silviculture constituted financial contributions in the form of grants is one an unbiased and objective investigating authority could have reached in light of the facts and arguments before it. Given that these payments were financial contributions in the form of grants, the USDOC also correctly determined that the amount of the benefit conferred equaled the full amount of the grants provided. None of Canada's arguments show that the USDOC's determinations involving these grants were inconsistent with Articles 1.1(a)(1)(i), 1.1(b), 14, 19.3, and 19.4 of the SCM Agreement.

VI. THE USDOC'S DETERMINATIONS REGARDING PROVINCIAL ELECTRICITY SUBSIDIES ARE NOT INCONSISTENT WITH ARTICLES 1.1(A)(1)(II), 1.1(B), 10, 14(D), 19.1, 19.3, AND 19.4 OF THE SCM AGREEMENT

Benefit to Producers of Electricity Purchased by BC Hydro and Hydro-Quebec

68. Canada argues that the United States acted inconsistently with Articles 1.1(b) and 14(d) of the SCM Agreement because the benchmarks selected by the USDOC to measure the subsidies associated with the purchases of electricity by BC Hydro and Hydro-Quebec did not reflect prevailing market conditions for the sale of the relevant type of electricity. Canada's arguments lack merit.

69. The USDOC defined the relevant marketplace in this investigation as the market where BC Hydro both bought electricity from Tolko and West Fraser and sold electricity to Tolko and West Fraser. In doing so, the USDOC rejected the notion that the relevant market should be limited just to the side of the market where BC Hydro bought electricity from Tolko and West Fraser. Contrary to Canada's assertions, every comparison under Article 14(d) requires a comparison source (*i.e.*, a benchmark) that is separate and independent from the financial contribution being examined to ascertain whether an artificial advantage results from that financial contribution. As the USDOC observed, "[t]he adequacy of remuneration does not exist in a vacuum; to determine whether remuneration is 'adequate,' a comparison source is needed".

70. The USDOC similarly confirmed that, "[i]n this investigation, Resolute is not merely selling electricity to Hydro-Québec; Resolute also purchases electricity from Hydro-Québec". The USDOC determined that, for this type of government purchase, "where the government is acting on both sides of the transaction—*i.e.*, both selling a good to, and purchasing the good back from, a respondent—the benefit to the respondent is the difference between the price at which the government is selling the good to the company, and the price at which the government is purchasing the good back from the company". In doing so, the USDOC rejected the notion that the relevant market should be limited just to the side of the market where Hydro-Quebec bought electricity from Resolute.

71. Based on the Appellate Body report in *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, Canada argues that "the government mandates that direct BC Hydro and Hydro-Quebec to include biomass-based electricity in their supply mixes mean that this type of electricity is not substitutable with other kinds of electricity in these provinces at the wholesale level, or critically with electricity in the retail markets".

72. Canada ignores critical elements of the Appellate Body's reasoning in *Canada – Renewable Energy / Canada – Feed-in Tariff Program*. The Appellate Body's reasoning in that dispute was built entirely upon Ontario's efforts to reduce reliance on fossil fuels. Also, the Appellate Body, in analyzing such interventions, stated that it is important to draw "a distinction … between, on the one hand, government interventions that create markets that would otherwise not exist and, on the other

hand, other types of government interventions in support of certain players in markets that already exist, or to correct market distortions therein".

73. There is absolutely no support for Canada's proposition that the USDOC should have inferred that British Columbia and Quebec created markets for renewable electricity that otherwise would not have existed but for certain subsidy programs. The evidence before the USDOC during the investigation demonstrated that:

- ☐ the renewable energy markets in British Columbia and Quebec were not new (in fact, they were well established);
- ☐ the pertinent subsidy programs promoted the purchase of electricity mostly from the existing renewable energy markets and mostly from renewable energy facilities already in existence; and
- ☐ British Columbia and Quebec did not intervene through subsidy programs to reduce reliance on fossil energy resources, or to create uniquely biomass-based electricity markets, but intervened generally to support existing players in the well-established renewable energy market.

74. The USDOC also was under no obligation to demonstrate as part of its determination that British Columbia and Quebec had not intervened in the marketplace to create new markets that otherwise would have not existed but for the subsidies at issue. The Appellate Body's reasoning in *Canada – Renewable Energy / Canada – Feed-in Tariff Program* does not suggest that an investigating authority is required under the SCM Agreement to determine in every countervailing duty proceeding whether the market for a good came into existence because of government intervention. Indeed, the Appellate Body cautioned that "[t]o do so would mean to read an exception into Article 1.1(b) based on the rationale of the subsidy that has no textual basis in the [SCM] Agreement". And no other panel or Appellate Body report has ever mentioned this so-called "requirement" as a critical element that must guide the assessment of the adequacy of remuneration for a government-provided or government-purchased good.

Benefit of the New Brunswick LIREPP

75. Canada separately argues that the United States acted inconsistently with Articles 1.1(a)(1)(ii), 1.1(b), and 14(d) of the SCM Agreement because the USDOC should have analyzed the New Brunswick Large Industrial Renewable Energy Purchase Program ("LIREPP") as the purchase of a good by NB Power rather than as a form of revenue foregone.

76. The USDOC properly determined that the LIREPP constitutes a financial contribution to JDIL in the form of revenue foregone. NB Power calculates a credit, which is applied to each participant's electricity bill, equivalent to "the amount of renewable energy that NB Power will purchase from the LIREPP participant … and the amount of electricity that NB Power will sell to the LIREPP participant". This credit is separate and apart from any purchases of renewable energy from the participants and simply reduces the participant's electricity payment to NB Power. The USDOC found that, "[u]nder the LIREPP program, NB Power first determines the credit it wants to give the large industrial customers, such as JDIL; NB Power then works backwards to build up to that credit through a series of renewable energy power purchases and sales and additional credits". The LIREPP credit thus was the cash that participating Irving companies did not spend on the electricity bill they received from NB Power, decreased the amount of NB Power's revenue as a Crown corporation, and was properly considered by the USDOC under Article 1.1(a)(1)(ii) in the form of government revenue foregone.

Attribution of Electricity Subsidies to Producers of Softwood Lumber

77. Finally, Canada argues that the USDOC acted inconsistently with Articles 10, 19.1, 19.3, and 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 when it attributed the provincial electricity subsidies to the producers under investigation.

78. The GATT 1994 and the SCM Agreement both contemplate the application of countervailing duties for subsidies that may benefit more than the product under investigation. Nothing in the GATT 1994 or SCM Agreement suggests an investigating authority need attempt to trace subsidy benefits from receipt to the moment of actual use. As the Appellate Body has observed, "the appropriate inquiry into the existence of a product-specific tie requires a scrutiny of the design, structure, and operation of the subsidy at issue, aimed at ascertaining whether the bestowal of that

subsidy is connected to, or conditioned on, the production or sale of a specific product". In this regard, panels and the Appellate Body have long recognized that a Member may offset countervailable subsidies received by a producer with respect to inputs used in the production of a product processed from such inputs.

79. The USDOC considered the design, structure, and operation of the electricity subsidies at issue and determined that each provincial subsidy was not connected to, or conditioned on, the production or sale of a specific product at the point of bestowal. Electricity is an input utilized in every aspect of the manufacturing operations of the recipient companies, including the production of softwood lumber. The evidence of record before the USDOC demonstrated that the provincial electricity subsidies did not require or induce the recipients to engage in any activities connected to the production or sale of a processed product other than softwood lumber. This evidence also demonstrated that these subsidies provided a benefit to every aspect of the recipients' manufacturing operations.

80. The USDOC's determination that the provincial electricity subsidies were provided to the overall operations of the recipients – and thus attributable to the sales of all products produced by the recipients, including softwood lumber – is one an unbiased and objective investigating authority could have reached in light of the facts and arguments that were before it. None of Canada's arguments otherwise establish that the United States acted inconsistently with its obligations under Article VI:3 of the GATT 1994 and Articles 10, 19.1, 19.3, and 19.4 of the SCM Agreement.

VII. THE USDOC'S DETERMINATION TO TREAT THE ACCELERATED CAPITAL COST ALLOWANCE TAX PROGRAM AS *DE JURE* SPECIFIC IS NOT INCONSISTENT WITH ARTICLES 2.1(A) AND 2.1(B) OF THE SCM AGREEMENT

81. Canada argues that the Accelerated Capital Cost Allowance tax program for Class 29 assets ("ACCA Class 29 assets program") cannot be *de jure* specific because the explicit limitation set out in this program supposedly relates only to machinery and equipment and the activities for which such machinery or equipment is primarily used. Canada's arguments lack merit.

82. A subsidy can be *de jure* specific without explicitly identifying eligible industries and enterprises by name. A subsidy is *de jure* specific "[w]here the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises". The *de jure* specificity analysis "focuses … on whether *access* to [a] subsidy has been explicitly limited" and "situates the analysis for assessing any limitations on *eligibility* in the particular legal instrument or government conduct effecting such limitations".

83. According to the Appellate Body, "the inquiry under Article 2 hinges on limitations on '*eligibility* for a subsidy' in respect of certain recipients [and therefore] [e]ligibility may be limited in 'many different ways', e.g. by virtue of the type of activities conducted by the recipients or the region where the recipients run those activities". Therefore, activity-based exclusions are one way in which access to and eligibility for a subsidy may be explicitly limited to certain enterprises, thereby satisfying the *de jure* specificity criteria under Article 2.1(a).

84. The record before the USDOC showed that the ACCA Class 29 assets program is explicitly limited to "manufacturing and processing" activities and that the *Income Tax Act* and *Income Tax Regulations* exclude numerous activities from the definition of "manufacturing and processing". Enterprises and industries engaged exclusively in the activities excluded from the definition of "manufacturing and processing" are ineligible to receive the tax benefits as a matter of law. For this reason, the USDOC found the program to be *de jure* specific.

85. The existence of other tax deductions and exemptions under Canada's *Income Tax Act* does not otherwise render this program non-specific. The other tax provisions that Canada identified provide for different financial contributions, different benefit amounts, and different criteria for eligibility. None of these other tax provisions provide the same subsidy to those enterprises and industries precluded from access to the deductions from taxable income for the capital cost of property that is provided under the ACCA Class 29 assets program.

86. Canada has failed to demonstrate that an unbiased and objective investigating authority could not have concluded that the ACCA Class 29 assets program is *de jure* specific. Therefore, Canada has failed to demonstrate an inconsistency with Articles 2.1(a) and 2.1(b) of the SCM Agreement.

VIII. CANADA'S "MARITIMES STUMPAGE BENCHMARK CLAIM" HAS NO BASIS IN THE SCM AGREEMENT OR THE DSU

87. Canada claims that something it calls the "Maritimes Stumpage Benchmark" is inconsistent with Articles 1.1(b) and 14(d) of the SCM Agreement. Canada's claim fails for a number of reasons. First, the so-called "Maritimes Stumpage Benchmark" is not susceptible to WTO dispute settlement as a measure of "present and continued application". Second, the so-called "Maritimes Stumpage Benchmark" cannot be challenged as "ongoing conduct". Third, even if the "Maritimes Stumpage Benchmark" were susceptible to WTO dispute settlement, Canada has not demonstrated that it would necessarily result in an inconsistency with Articles 1.1(b) or 14(d) of the SCM Agreement.

88. Canada has not established that any measure exists, so it cannot be attributable to the United States. Neither Article 14(d) of the SCM Agreement nor the USDOC's determinations contemplate this concept of an "in-market" benchmark as Canada conceives it. The United States does not accept Canada's premise of "an in-market benchmark". Canada has also failed to establish the precise content of the alleged measure because Canada uses inconsistent descriptions of the content of the measure at different times and repeatedly qualifies its allegation with the phrase: "when faced with the relevant factual circumstances". These allegations are insufficient to establish the precise content of the alleged measure. Finally, Canada does not establish present and continued application of the alleged measure. The USDOC has, on some occasions, decided to rely on evidence of stumpage prices from Nova Scotia or New Brunswick as a benchmark for stumpage provided by the government in countervailing duty proceedings involving stumpage in Canada. That is entirely appropriate given that the "starting point" of the analysis under Article 14(d) is private prices in the country of provision.

89. Canada's alternative claim fails because "ongoing conduct" is not a measure subject to dispute settlement and, even if it were, Canada has not demonstrated that "ongoing conduct" – as that concept has been elaborated in prior Appellate Body reports – exists in this situation. Ultimately, Canada's claim fails because Canada has not identified any inconsistency with Articles 1.1(b) or 14(d) of the SCM Agreement that would necessarily result from the so-called measure.

IX. CONCLUSION

90. For the reasons given throughout this panel proceeding, the United States respectfully requests that the Panel reject Canada's claims in their entirety.

ANNEX C

ARGUMENTS OF THE THIRD PARTIES

ANNEX C-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF BRAZIL

I. THE PROPER SELECTION OF BENCHMARKS UNDER ARTICLE 14(d) OF THE SCM AGREEMENT

1. The fact that a government is a significant provider of goods or services or purchaser of goods does not necessarily mean that the prices of those goods and services are not market-driven and thus distorted for the calculation of the amount of the benefit. The text of Article 14(d) indicates that there must be no presumption of price distortion on the sole grounds of a government being a relevant participant in a certain market. Article 14(d) reads: "the provision of goods or services or purchase of goods by a government *shall not be considered* as conferring a benefit ***unless*** (…)".

2. Brazil notes that the analysis of market distortion must be carried out on a case-by-case basis, in accordance to the "predominance test".[1] Under this test, an investigating authority would be allowed to reject in-country benchmarks only when the "government's role in providing the financial contribution is so predominant that it effectively determines the price at which private suppliers sell the same or similar goods".[2] Furthermore, the predominance refers to the degree of power governments dispose to influence internal prices, not merely governments' share in the market.[3]

3. It is also important to note that price distortion is in direct proportion to government influence, in the sense that the less the influence that a government has in a market, the smaller the possibility of price distortion. In light of these circumstances, there would seem to be a higher evidentiary threshold to demonstrate that private prices are distorted in cases where government is a significant supplier than in cases where the government is a predominant supplier. The panel in *US – Coated Paper (Indonesia)*[4] concluded that "other evidence would carry limited weight" when the position of the government in the market is closer to that of a sole supplier. Conversely, when the government is only a significant supplier, evidence would carry more weight.

4. According to Article 14(d), the choice of a benchmark must reflect "prevailing market conditions for the good or service in question *in the country of provision*". The first option to be considered by an investigating authority, therefore, "is the prices at which the same or similar goods are sold by private suppliers in arm's length transactions in the country of provision".[5] If the investigating authority concludes that prices in arm's length transactions are distorted by governmental action, it can have recourse to out-of-market benchmarks. The selection of out-of-market benchmarks must not be arbitrary or unjustified. Preference should be given to benchmark prices resulting from the same or similar prevailing market conditions. In order to proceed to an accurate comparison, investigating authorities should make necessary adjustments regarding, for instance, "price, quality, availability, marketability and transportation of purchase or sale".

5. Brazil coincides with the Appellate Body's conclusion 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".[6] In this sense, Brazil believes that investigating authorities should take into account possible differences in comparative advantages between the countries.

6. As regards to USDOC's method of comparing individual transactions to average benchmarks, Brazil agrees with the panel's conclusion, in a report raised by both Canada and the United States, that "the language of Article 14(d) suggests more a disaggregated than an aggregate approach, both temporally and in respect of a 'good' in the sense of that provision (…)".[7]

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[1] See *US – Softwood Lumber IV*; *US – Anti-Dumping and Countervailing Duties (China)*.
[2] Appellate Body Report, *US – Softwood Lumber IV*, para. 100.
[3] Appellate Body Report, *US – Anti-dumping and Countervailing Duties (China)*, para. 444.
[4] Panel Report. *US – Coated Paper (Indonesia)*, para. 7.61.
[5] Appellate Body Report, *US – Softwood Lumber IV*, para. 90.
[6] Appellate Body Report, *US – Softwood Lumber IV*, para. 108.
[7] Panel Report, *US – Antidumping and Countervailing Duties (China)*, para. 11.56.

II. THE POSSIBILITY OF SETTING TO ZERO THE RESULTS OF CERTAIN COMPARISONS USED TO ASSESS ADEQUACY OF REMUNERATION

7. Brazil agrees that Article 14 leaves "significant scope for an investigating authority to seek the appropriate methodology to measure benefit".[8] However, the guidelines contained in the paragraphs of Article 14 are binding limits to such "significant scope". According to the chapeau of Article 14, "any such method *shall be consistent with the following guidelines* (…)". The term "any method" is restrained by the listed guidelines, including the obligation to select an appropriate benchmark for assessing the adequacy of the remuneration received for the provision of a good or service or the purchase of a good.

8. Furthermore, Article VI:3 of the GATT 1994 proscribes the possibility of countervailing duties being "levied on any product of the territory of any contracting party imported into the territory of another contracting party in excess of an amount *equal* to the estimated bounty or subsidy determined to have been granted (…)". Article 19.3 of the SCM Agreement establishes that countervailing duties shall be levied "in the *appropriate amounts* in each case".

9. Assuming that the investigating authority has selected a benchmark in accordance with Article 14(d) of the SCM Agreement, *i.e.* a benchmark that reflects the prevailing market conditions existing in the market of provision of the good, it can proceed to compare each transaction price to the chosen benchmark. In instances in which the transaction price is higher than the benchmark price, the negative result (benchmark price minus transaction price) means that no benefit was conferred; in instances in which the transaction price is lower than the benchmark price, the positive result (benchmark price minus transaction price) means that a benefit was indeed conferred.

10. The total monetary benefit conferred by the government equals the sum of individual positive results (expressed in prices per unit of the product) multiplied by the volume of the good provided in each transaction. The fact that in some instances the transaction price is higher than the benchmark price simply says that the government conferred no benefit to the purchaser of the good. A negative result does not mean that the government derives some benefit or takes a financial contribution away from the purchaser of the good. The fact that benefits are not conferred in certain transactions does not mean that subsidies associated with the transactions where a benefit was conferred are somehow offset or eliminated. Consequently, negative results either will not be added to the equation for the finding of the total benefit or they will be set to zero in order not to alter the final result.

11. In Brazil's view, one way to properly calculate the countervailing duty on the basis of a given set of transactions could be the use of a weighted average, as indicated by the following equation:

$$B = (P_B - P_T) \times V$$

In this equation, B is the benefit in a determined transaction; P_B represents the benchmark price per unit, P_T indicates the transaction price per unit; V is the volume of goods involved in the transaction. For each transaction, the benefit conferred by the government equals the multiplication of the volume of goods sold by the government by the difference between the benchmark and the transaction price. Adding the amount of the benefit for the given set of transactions yields:

$$B_T = B_1 + 0 + B_3 + B_4 + 0 + \ldots + B_N$$

The zeroes were added to the equation to emphasize that transactions where no subsidy is found should not be considered.

12. The next step is to determine the countervailing duty to be levied on imported goods. Article 19.4 of the SCM Agreement establishes that "no countervailing duty shall be levied on any imported product in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product". Since the importing country cannot levy duties in excess of the total subsidy granted by the exporting country, the investigating authority should estimate how much of the total subsidy is attributable to each good in the total set of goods under investigation. In order to do so, the investigating authority needs to construct a weighted average composed (i) by the total amount of benefit in the numerator of the equation and

[8] United States' First Written Submission, para. 504.

(ii) the total amount of goods provided by the government in the denominator of the equation, including those goods for which the government received adequate remuneration:

$$\text{CVD per unit of imported good} = \frac{B_1 + 0 + B_3 + B_4 + \ldots + B_N}{V_1 + V_2 + V_3 + V_4 + \ldots + V_N}$$

ANNEX C-2

INTEGRATED EXECUTIVE SUMMARY OF THE
ARGUMENTS OF THE EUROPEAN UNION

I. CANADA'S CLAIMS UNDER ARTICLE 14(D)

A. The existence of regional markets and benchmarks

1. The EU does not agree with the US argument that any in-country benchmark is *per se* consistent with Article 14(d). There may be several different markets (e.g. regional) within the same country with differing market conditions. The use of any "in-country" price is therefore not a benchmark that is automatically consistent under Article 14(d) for other regions in the same country on the sole basis that it originates from the country of provision. This also reflects the position of the Appellate Body in *Canada – FIT*.[1] Ignoring the differences between regions would risk miscalculating the benefit amount and hence run counter the objective of Article 14, which is to calculate the appropriate amount of benefit. The existence of regional markets was also acknowledged by the Appellate Body under Article 6.3.

2. It may be that prices in regional markets are distorted so that, e.g. out-of-country benchmarks may have to be used instead. Price distortion may result, *inter alia*, from the predominant or significant position of the government as provider of the good in question. The evidentiary thresholds for these two scenarios are not identical. The case law always requires evidence other than market share in case of a "significant" market position (not for predominance) and also requires more of such additional evidence. The EU considers that market shares above 90% may be indicative of predominance.

B. Market concentration as element of price distortion

3. The EU takes the view that the high concentration of a market normally forms part of the prevailing market conditions in the country of provision and does not constitute an element market distortion. Article 14(d) does not call for perfectly competitive markets and perfectly competitive markets (and the perfect number of competitors) rarely exist in real life. Markets may be more fragmented or more concentrated, depending e.g. on the characteristics of the market concerned. However, an investigation authority may have to adjust an out-of-country benchmark (or a different regional benchmark) with a view to differing levels of market concentration, depending on the circumstances. There is no presumption that a concentrated private market is more susceptible to price alignment with government prices than a fragmented private market.

C. The relevance of competitive auctions for the assessment of price distortion

4. Canada argues that prices in certain provinces are not distorted, despite the fact that the government controls a very high market share, because a considerable amount of standing timber is sold through competitive auctions. The EU considers that, provided that the auction system does ensure competitive prices, the respective auction volume may be attributed to the competitive and hence "non-distorted" part of the market. A government cannot pursue its own pricing strategy or set prices if prices are set through competitive auctions and, to that extent, the government also cannot affect private prices.

D. The need for adjustments when determining the existence of benefit

5. The EU recalls that the Appellate Body acknowledged that adjustments to an out-of-country benchmark may be necessary in order to make it comparable to the prevailing market conditions in the country of provision.[2] The EU considers that the need for - and the extent of - adjustments will have to be determined in light of the specific circumstances of the case. Not every difference between two markets requires an adjustment and adjustments must not be made with respect to the

[1] Appellate Body Report, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, footnote 746.
[2] Appellate Body Report, *US – Softwood Lumber IV*, paras. 108-109, 116.

subsidized/distorted elements in the country of provision. Adjustments may also have to be made when "in-country" regional benchmarks are used, depending on the circumstances.

6. The issue of adjustments is separate from the issue of the selection of a proper benchmark. Markets may be so different from the markets investigated, that the prices in those markets cannot constitute – even with adjustments – a suitable benchmark.

E. Setting to zero certain comparison results

7. Regarding the issue of "setting to zero" by the US of certain comparisons in the benefit analysis, the EU considers that what matters, as confirmed by the Appellate Body, is that the selection of the appropriate benchmark should ensure a "meaningful comparison for the determination of benefit". The selection of the appropriate benchmark may depend on the circumstances of the case. In comparing a particular price with a benchmark under the SCM Agreement, in order for the result of the comparison to be meaningful, the guiding principle is that like must be compared with like, including possible adjustments. Accordingly, the terms and conditions of the price should in principle be comparable to those of the benchmark. The EU agrees with the United States that there is no general requirement under the SCM Agreement to provide "credits" for those transactions in which no benefit is conferred. This was also the position of a previous panel.[3]

II. ENTRUSTMENT OR DIRECTION UNDER ARTICLE 1.1(A)(1)(IV) OF THE SCM AGREEMENT

8. Mere acts of encouragement by the government, or an effect on prices that is merely co-incidental or a by-product of legitimate governmental regulation, do not suffice for entrustment or direction under Article 1.1(a)(1)(iv). The United States is correct that a range of measures could amount to entrustment or direction. Explicit delegation or command is not required. However, the fact that there may be different methods of entrusting or directing does not mean that Members should be allowed to apply countervailing measures "whenever a government is merely exercising its general regulatory powers".[4] The EU disagrees with the arguments of the United States to the extent that they suggest that a government entrusts or directs private entities whenever it "regulates the course of its conduct".[5]

9. Entrustment or direction cannot be presumed, and it cannot be found to exist on the sole basis that a governmental measure has an incidental effect on prices or other conditions of competition. Whatever the effects of a measure may be in the marketplace, entrustment or direction requires either that the government gives responsibility to a private body, or exercises its authority over a private body, in order to effectuate a financial contribution.[6] It should however be kept in mind that entrustment or direction frequently takes place in ways that are informal or even covert.

10. A measure involving an export restraint could constitute entrustment or direction depending on the relevant facts and evidence, taking the measure as a whole and possibly in combination with other relevant measures or pronouncements by the government. The EU does not take a position on whether such elements were shown to exist in this case. However, we note that the United States does not consider USDOC's findings to be based purely on the effects of the export restraint.

11. Regarding the distinction between the references to "the government" and "governments" in Article 1.1(a)(1)(iv), the EU considers that "the government" refers to the government that is said to be entrusting or directing the private body, whereas "governments" refers to governments in general, i.e. neither to the specific government allegedly entrusting or directing, nor to any other particular government.

III. DIRECT TRANSFERS OF FUNDS AND PURCHASES OF SERVICES

12. The EU agrees with the United States that there may be circumstances in which a transaction could be described as a grant even though it reimburses the costs of an activity performed by the alleged recipient of the subsidy. Thus, governmental transfers of funds should not be automatically

[3] Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 11.50.
[4] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 115.
[5] United States' first written submission, para. 553.
[6] Appellate Body Report, *US – Countervailing Duty Investigation on DRAMs*, para. 113.

excluded from Article 1.1(a)(1)(a) just because they are said to have occurred as reimbursement for the provision of a service.[7]

13. There is no Appellate Body finding, and no upheld panel finding, that purchases of services are excluded from the coverage of Article 1.1(a)(1)(a). On a proper reading of Article 1.1(a)(1)(a), an alleged purchase of services could give rise to a financial contribution, such as a direct transfer of funds. Completely excluding purchases of services would frustrate the object and purpose of the SCM Agreement by creating a massive loophole in the Agreement's coverage.

IV. THE DETERMINATION OF BENEFIT WITH RESPECT TO PROVINCIAL ELECTRICITY PROGRAMMES

14. The main issue in dispute between the parties is whether or not the relevant market is only that for the type of electricity from renewable sources (biomass) purchased by Canada, or for all types of electricity. The panel should therefore consider whether there are pertinent reasons to distinguish this case from the circumstances in *Canada – FIT*, such that the Appellate Body's reasoning would not apply. The Panel should consider any relevant differences that have been alleged.

15. The EU agrees that the fact that a benchmark is tailored to the circumstances of the same companies said to be receiving a subsidy may be relevant in deciding whether that benchmark is appropriate. However, the Appellate Body's guidance in *Canada – FIT* focused on the costs and characteristics of renewable energy and the importance of the government's definition of the energy supply-mix, as opposed to, for example, the views of various market participants on the substitutability of electricity, or whether or not the same companies happened to both buy and sell electricity.

16. Even if the panel were to agree with Canada on the issue of the relevant market, this would not be the end of the enquiry. A benefit would still exist if the electricity purchase prices did not reflect a hypothetical market outcome. An appropriate benchmark for biomass electricity generation would thus normally need to be found, for example by considering price-discovery mechanisms. However, the relevance of price discovery mechanisms for the existence of benefit will depend on the circumstances.

V. ACTIVITY-BASED EXCLUSIONS AND DE JURE SPECIFICITY UNDER ARTICLE 2.1(A) OF THE SCM AGREEMENT

17. The SCM Agreement does not define an "industry", or list "industries", for the purposes of Article 2.1. Whether a measure that limits access to certain activities can also be said to limit access to certain industries will depend on the nature of the activities at issue. For example, certain activities could even, for all practical purposes, amount to industries.

[7] United States' first written submission, paras. 634. ("The governments each reimbursed the relevant companies for performing tasks that they had legally required the companies to perform.") 636 ("New Brunswick held JDIL legally responsible for performing certain silviculture and forest management, then separately reimbursed JDIL for the costs associated with its performance of those activities."); emphasis added.

ANNEX C-3

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

I. USE OF OUT-OF-COUNTRY BENCHMARKS IN RELATION TO STANDING TIMBER – ARTICLE 14(D) OF THE SCM AGREEMENT

1. Japan notes that the four paragraphs of Article 14 of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement") provide guidelines with respect to particular types of financial contributions that must be consistently followed in the methods for the calculation for a benefit conferred to the recipient. These methods must be prescribed in the national legislation or implementing regulations concerning countervailing duties. The guideline set forth in Article 14(d) of the SCM Agreement is that the provision of goods by a government shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration. It further provides that 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 purchase or sale).

2. The Appellate Body in *US – Softwood Lumber IV* found that, in cases where the private prices of the goods in question in the country of provision are distorted because of the predominant role of the government in the market as a provider of the same or similar goods, despite the guidelines set forth in Article 14(d), it is possible to resort to an out-of-country benchmark or to constructed benchmark, provided that the necessary adjustments are made to reflect conditions in the market of purchase.[1] The "very purpose" of resorting to an out-of-country benchmark is to replicate competitive market conditions that are absent in the country of purchase.[2]

3. Price distortion must be established on a case-by-case basis and investigating authorities must consider evidence relating to factors other than government market share.[3] In conducting the analysis for selecting a proper benchmark, the Appellate Body in *US – Carbon Steel (India)* stated that "what an investigating authority must do […] will vary depending upon the circumstances of the case, the characteristics of the market being examined, and the nature, quantity, and quality of the information supplied by petitioners and respondents, including such additional information an investigating authority seeks so that it may base its determination on positive evidence on the record".[4]

4. Contrary to Canada's suggestion,[5] in Japan's view, an investigating authority is not required to establish "a clear causal link" between the government intervention in the market and "an alleged substantial distortion of in-market prices". While in-country prices may deviate from a market-determined price "as a result of governmental interventions in the market"[6] and an investigating authority should demonstrate that government interventions distort the conditions of competition in the relevant market, neither the Appellate Body nor prior panels have required an investigating authority to establish such a "clear causal link". Indeed, such a requirement is inconsistent with the Appellate Body's recognition that price distortion is likely where the government has a predominant

[1] Appellate Body Report, *US – Softwood Lumber IV*, paras. 90 and 119. In *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body applied a similar reasoning in the context of Article 14(b) of the SCM Agreement, stating that there is "no inherent limitations in Article 14(b) that would prevent an investigating authority from using as benchmarks interest rates on loans denominated in currencies other than the currency of the investigated loan, or from using proxies instead of observed interest rates, in situations where the interest rates on loans in the currency of the investigated loan are distorted and thus cannot be used as benchmarks". (Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, paras. 484-489).

[2] See, Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.184.

[3] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 446.

[4] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.157.

[5] Canada's first written submission, para. 54.

[6] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.155.

role as a provider of goods and that in such circumstances other evidence carries only limited weight.[7]

5. Furthermore, the panel in *US – Countervailing Measures (China) (Article 21.5 – China)* rejected the argument that an investigating authority may resort to an out-of-country benchmark only when it has established that in-country prices are effectively determined by the government, either *de jure* or *de facto*.[8]

6. Japan agrees that the investigating authority should be allowed to use an out-of-country benchmark in case where there is price distortion in the relevant market. Nonetheless, Japan believes that government measures or interventions in a market do not always distort prices. The Appellate Body has cautioned that while a government's predominant role as a supplier in the market makes it "likely" that private prices will be distorted, the distortion of private prices must be established on a case-by-case basis, according to the particular facts underlying each countervailing duty investigation.[9] As the Appellate Body also clarified in *US – Anti-Dumping and Countervailing Duties (China)*, the fact that the government is a significant supplier cannot alone justify a finding that prices are distorted.[10]

7. Provided that an investigating authority reasonably and adequately explains the basis for its conclusions in determining a proper benchmark, the complainant bears the burden to present a *prima facie* case that the investigating authority's determination is inconsistent with Article 14(d). This includes the burden of explaining any deficiencies in the investigating authority's finding that prices in the relevant markets do not reflect market conditions (i.e., are distorted). Having said that, Japan notes that, in the underlying investigation in this case, Canada submitted extensive evidence to show that the relevant market is not distorted. An investigating authority may not determine price distortion without taking into full consideration the evidence and arguments submitted by interested parties, including the government of the targeted country, in the course of the underlying investigation. The Appellate Body has emphasized in this regard that "an investigating authority should always consider all evidence regarding other factors on the record, but the extent to which such evidence carries weight depends on how predominant the government's role is and on the relevance of other factors".[11]

8. With regard to specific elements to consider in finding "price distortion", the Appellate Body has stated that "an investigating authority may be called upon to examine various aspects of the relevant market".[12] And "[t]his examination may involve an assessment of the structure of the relevant market, including the type of entities operating in that market, their respective market share, as well as any entry barriers".[13]

9. Japan submits that it is necessary to distinguish between the "circular situation" and market concentration. In a "circular situation" where the government determines the price for the good provided by the government, the price must not be relied on regardless of the level of concentration. In other situations, the level of concentration may be relevant and determination of the proper benchmark should be made on a case-by-case basis taking into account factors such as enforcement of competition policies and regulations as well as business and contractual relationships.

10. Furthermore, Japan considers that whether the price in the market is formed through arm's length transactions based on commercial considerations of the respective market actors can be relevant for the determination of price distortion. Unlike government authorities, including local authorities, whose actions are not based on commercial considerations, independent market actors should in principle act solely in accordance with commercial considerations. Evidence that actors do not act based on commercial considerations under certain government interventions would provide a strong indication that prices determined through interactions of such actors are distorted.

[7] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 446.
[8] Panel Report, *US – Countervailing Measures (China) (Article 21.5 – China)*, paras. 7.162, 7.174.
[9] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.156; Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 453; Appellate Body Report, *US – Softwood Lumber IV*, para. 102.
[10] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 441.
[11] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 453.
[12] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.157.
[13] Appellate Body Report, *US – Carbon Steel (India)*, footnote 754 to para. 4.157.

11. The auction systems that Canada claims are in place in B.C. and Québec may be one of the factors that could suggest that the relevant actors, i.e. buyers and sellers, operate based on commercial considerations, but it requires careful examination and should be assessed on a case-by-case basis.[14]

12. Japan considers that it is important for the government to ensure that transactions under mechanisms for purchase or sale of goods and services are conducted by relevant actors on the basis of commercial considerations, even where such mechanisms involve some form of government interventions (such as procurement and/or government provision of goods or services).

II. EXPORT RESTRAINTS AS SUBSIDIES IN RELATION TO LEP – ARTICLE 1.1 OF THE SCM AGREEMENT

13. The panel in *US – Export Restraints* found that the requirement of a financial contribution under Article 1.1(a)(1) of the SCM Agreement from the outset was intended to ensure that not all government measures that confer a benefit should be considered as subsidies.[15] The Appellate Body in *Canada – Renewable Energy* further clarified that a panel should scrutinize the measure both as to its design and operation and identify its principal characteristics.[16]

14. Japan agrees that Article 1.1(a)(1) of the SCM Agreement limits the scope of government and private conduct that may constitute financial contributions and therefore subsidies within the meaning of the SCM Agreement.[17] In this sense, Article 1.1(a)(1) limits the scope of application of the SCM Agreement by defining the government conduct that constitutes a subsidy. The structure, design and operation of export restraint measures must be examined carefully before a determination can be made that such measures constitute a covered financial contribution.

III. AMOUNT OF BENEFIT CALCULATED BASED ON PRICE OF ELECTRICITY

15. In *Canada – Renewable Energy/ Canada – Feed-in Tariff Program*, the Appellate Body held, in the context of addressing serious prejudice claim rather than examining the WTO-consistency of countervailing duties, that the benefit comparison for a particular type of electricity, such as wind, solar or biomass, must be made in relation to the terms and conditions that would be available under market-based comparisons for that specific type of electricity and "should not be conducted within the competitive wholesale electricity market as a whole, but within competitive markets for wind- and solar PV-generated electricity, which are created by the government definition of the energy supply-mix"[18] as there are separate markets for different types of electricity.

16. Japan agrees with the Appellate Body on the need to analyze supply-side factors in the definition of the relevant market. However, Japan considers that in determining the proper market benchmark for electricity in particular, the investigating authority is required to first determine whether there are "separate markets for different types of electricity" or is a single market for electricity as a whole in the relevant economy because both biomass and conventional electricity, which are physically alike, may simply compete in the same market in terms of pricing, and therefore there is no need to distinguish between such "types" of electricity. Japan emphasizes that unless it is proven that electricity is not treated as a commodity and not substitutable in the country at issue, it should be presumed that there are no such separate markets. Provided that consumers do not differentiate between the types of electricity generated[19] and are willing to pay a single price for electricity regardless of the production technologies, there should be no rationale to suppose that

[14] In *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, the Appellate Body observed that a benchmark may be found in price-discovery mechanisms such as competitive bidding, which ensure that the price paid by the government is the lowest possible price offered by a willing supply contractor. This statement was made in the context of government purchases of goods, but would seem applicable also where a government provides goods and competitive bidding ensures that the government obtains the *highest* price offered by willing buyer. (Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.228).

[15] Panel Report, *US – Export Restraints*, para. 8.65. See also Appellate Body Report*, US – Softwood Lumber IV*, footnote 35 to para. 52.

[16] Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.120.

[17] As the Appellate Body noted in *US – Large Civil Aircraft (2nd complaint)*, "[s]ubparagraphs (i)-(iv) exhaust the types of government conduct deemed to constitute a financial contribution. (Appellate Body Report, *US – Large Civil Aircraft (2nd complaint)*, para. 614).

[18] Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.178.

[19] United States' first written submission, para. 696.

there are such separate markets. The U.S. Department of Commerce used a wholesale price in the general electricity market as a benchmark for benefit calculation. Japan requests that the Panel take the foregoing into consideration in examining whether or not this finding is reasonable.

17. In addition, Japan understands that, under the current procedures set forth in the SCM Agreement, the investigating authority is not required to examine the purpose of the subsidies in determining whether to impose countervailing measures. However, Japan considers it important to assess the nature, design, and operation of the subsidy at issue in examining its legality under the SCM Agreement. Japan recalls that the Appellate Body in *US – Upland Cotton* emphasized the important role that the 'nature' of a subsidy plays in evaluating whether the subsidy has caused 'serious prejudice' to the interest of another WTO Member.[20] Japan believes that where certain subsidies have positive effects not only on the recipients, but also on any private entity in the relevant industry (for example, subsidies to promote research and development), such subsidies may be found not to cause serious prejudice depending on factual circumstances including their "nature", while those subsidies can be subject to countervailing duty measures.

[20] Appellate Body Report, *US – Upland Cotton,* para. 450. Furthermore, the Appellate Body in *EC and certain member States – Large Civil Aircraft*, noted that the appropriateness of a particular methodology for the establishment of causation must depend on factors such as "*the nature, design, and operation of the subsidies at issue*". (Appellate Body Report, *EC and certain member States – Large Civil Aircraft,* para. 1376).