

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

(DS533)

**COMMENTS OF THE UNITED STATES ON CANADA’S RESPONSES
TO THE PANEL’S ADDITIONAL QUESTIONS TO THE PARTIES**

March 23, 2020

TABLE OF REPORTS

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<i>China – GOES (Panel)</i>	Panel Report, <i>China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States</i> , WT/DS414/R and Add.1, adopted 16 November 2012, upheld by Appellate Body Report WT/DS414/AB/R
<i>EC – Countervailing Measures on DRAM Chips (Panel)</i>	Panel Report, <i>European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea</i> , WT/DS299/R, adopted 3 August 2005
<i>Japan – DRAMs (Korea) (AB)</i>	Appellate Body Report, <i>Japan – Countervailing Duties on Dynamic Random Access Memories from Korea</i> , WT/DS336/AB/R and Corr.1, adopted 17 December 2007
<i>US – Coated Paper (Indonesia) (Panel)</i>	Panel Report, <i>United States – Anti-Dumping and Countervailing Measures on Certain Coated Paper from Indonesia</i> , WT/DS491/R and Add.1, adopted 22 January 2018
<i>US – Cotton Yarn (AB)</i>	Appellate Body Report, <i>United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan</i> , WT/DS192/AB/R, adopted 5 November 2001
<i>US – Countervailing Duty Investigation on DRAMS (AB)</i>	Appellate Body Report, <i>United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea</i> , WT/DS296/AB/R, adopted 20 July 2005
<i>US – Countervailing Measures (China) (Panel)</i>	Panel Report, <i>United States – Countervailing Duty Measures on Certain Products from China</i> , WT/DS437/R and Add.1, adopted 16 January 2015
<i>US – Countervailing Measures on Certain EC Products (Article 21.5 – EC) (Panel)</i>	Panel Report, <i>United States – Countervailing Measures Concerning Certain Products from the European Communities – Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS212/RW, adopted 27 September 2005
<i>US – Supercalendered Paper (Panel)</i>	Panel Report, <i>United States – Countervailing Measures on Supercalendered Paper from Canada</i> , WT/DS505/R and Add. 1, circulated 5 July 2018
<i>US – Tyres (China) (AB)</i>	Appellate Body Report, <i>United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China</i> , WT/DS399/AB/R, adopted 5 October 2011

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U.S. First Written Submission	
USA-001	Commerce, Benchmark Calculation Memorandum for the Preliminary Determination, Apr. 24, 2017 (“Preliminary Benchmark Memorandum”)
USA-002	Commerce, Benchmark Calculation Memorandum for the Final Determination, Nov. 1, 2017 (“Final Benchmark Memorandum”)
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USA-004	Definition of “appropriate” from <i>The New Shorter Oxford English Dictionary</i> , L. Brown (ed.) (Clarendon Press, 1993, 4 th ed.), Volume 2, p. 103
USA-005	Definition of “case” from <i>The New Shorter Oxford English Dictionary</i> , L. Brown (ed.) (Clarendon Press, 1993, 4 th ed.), Volume 2, p. 345
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USA-008	Definition of “would” from englishpage.com
USA-009	Explanation of Present Conditionals from englishpage.com
USA-010	Petitioners, “Petitions for the Imposition of Antidumping Duties and Countervailing Duties on Imports of Certain Softwood Lumber Products from Canada,” dated November 25, 2016, Exhibits 242-257.
USA-011	Government of Quebec Questionnaire Response, Exhibit QC-Other-15 (Investment program in forests subject to partial-cutting treatment) (March 15, 2017)
USA-012	JDIL Questionnaire Response, Exhibit SILV-01 (Standard Questions and Grant Appendices) (March 15, 2017)
USA-013	19 C.F.R. § 351.504(a) (“Grants - Benefit”) (Regulation: U.S. Department of Commerce)

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USA-014	Response to First Supplemental Questionnaire to West Fraser (April 14, 2017)
USA-015	Definition of “forgo/forego” from <i>The New Shorter Oxford English Dictionary</i> , L. Brown (ed.) (Clarendon Press, 1993, 4 th ed.), Volume 1, p. 1005, and definition of “revenue” from <i>ibid.</i> , Volume 2, p. 2579
USA-016	Exhibit GOC-CRA-ACCA-4 (March 14, 2017)
USA-017	Cartland, Michel, Depayre, Gérard, and Woznowski, Jan, “Is Something Going Wrong in the WTO Dispute Settlement?”, <i>Journal of World Trade</i> 46, no. 5 (2012): 979-1016
USA-018	<i>Uncoated Groundwood Paper from Canada</i> , 83 Fed. Reg. 48,863 (Int’l Trade Comm’n Sept. 27, 2018)
USA-019	Petitioners, Petitioners’ Comments on Canada’s Initial Questionnaire Responses, Exhibits 3, 4, 5, 8, 11, 12, 13, 19 and 32 (March 27, 2017)
USA-020	Definition of “grant” from <i>New Shorter Oxford English Dictionary</i> , L. Brown (ed.) (Clarendon Press, 1993, 4 th ed.), Volume 1, p. 1131
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USA-021	Government of Ontario Minor Corrections Exhibit ON-MC-6 (providing revised version of Exhibit ON-STATS-2)
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USA-039	Government of New Brunswick Verification Exhibit NB-VE-1
USA-040 (BCI)	Irving Initial Questionnaire Response (March 13, 2017), Exhibit Stump-02 (“Irving table stump-02.e”)
USA-041	Government of New Brunswick Submission of New Factual Information, Exhibit NB-STUMP-14
USA-042 (BCI)	Government of Quebec Verification Minor Corrections (June 17, 2017), Exhibit QC-STUMP-MC-1 (revised table 4)

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USA-043	Petitioner, Comments on Initial Questionnaire Responses (March 27, 2017) (public version) (excerpted, Vol. I, pp. 1-3) (“Petitioner Comments – Primary QNR Responses”)
USA-044 (BCI)	Government of Quebec Initial Questionnaire Response at Exhibit QC-STUMP-9 (Table 18)
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USA-046 (BCI)	Resolute Preliminary Calculation Memorandum (April 24, 2017)
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USA-050	Petition Exhibit 181: Ontario Crown Timber Charges for Forestry Companies
USA-051 (BCI)	Government of Nova Scotia Verification Exhibits: Exhibit NS-VE-8A, Exhibit NS-VE-8B, Exhibit NS-VE-8C, Exhibit NS-VE-8D, Exhibit NS-VE-8E, Exhibit NS-VE-8F, Exhibit NS-VE-9A, Exhibit NS-VE-9B, Exhibit NS-VE-9C, and Exhibit NS-VE-10.
USA-052	Petitioner Comments on Initial Questionnaire Responses (March, 27, 2017), Exhibit 26
USA-053	Government of British Columbia Supplemental Questionnaire Response, Exhibit BC-SUPP3-12
USA-054 (BCI)	Government of British Columbia Verification Exhibit GBC VER-6 (revised BC-SUPP3-12)
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USA-056	19 C.F.R. § 351.309(c)(2) (“Written Argument”) (Regulation: U.S. Department of Commerce)

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USA-057	Government of Quebec Initial Questionnaire Response (March 13, 2017), Exhibit QC-STUMP-20 (“Sustainable Forest Development Act”)
USA-058	Tolko Pre-Preliminary Determination Comments (April 11, 2017)
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USA-060	“Timeline for Log Exports in British Columbia”, Exhibit BC-VER-7, submitted by the Government of British Columbia in SC Paper from Canada – Expedited Review
U.S. Second Written Submission	
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USA-062	Initial Non-Stumpage Questionnaire (January 19, 2017)
USA-063	Initial Stumpage Questionnaire (January 19, 2017)
USA-064	Initial Questionnaire Addendum (January 31, 2017)
USA-065	Complete Set of Verification Outlines Issued to Parties
USA-066	Petitioner’s Comments on Initial Questionnaire Responses (March 27, 2017) (excerpted, Vol. I, pp. 1-71)
USA-067	Canada and British Columbia Case Brief Vol. III (July 27, 2017) (“GOC/GBC Case Brief”)
USA-068	British Columbia and the B.C. Lumber Trade Council Rebuttal Brief Vol. III (August 4, 2017) (“GBC/BCLTC Rebuttal Brief”)
USA-069	Resolute First Supplemental Questionnaire Response (Stumpage) (April 12, 2017)
USA-070	Ontario Case Brief (July 27, 2017)
USA-071	Petitioner Rebuttal Brief (August 7, 2017)
USA-072	USDOC Memorandum, “Hearing Transcript on CVD Issues,” dated August 24, 2017

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USA-073	USDOC Response to Requests for Clarification by Canadian Parties (issued Feb. 3, 2017)
USA-074	Supplemental Questionnaire to Resolute (issued Mar. 30, 2017)
USA-075	Government of Quebec Questionnaire Response, Exhibit QC-STUMP-22 (excerpt from <i>SFDA Regulations</i> , chapter A-18.1, r.7, section 89 of the regulation respecting standards of forest management for forests in the domain of the State (this portion of Exhibit QC-STUMP-22 is not included in Exhibit CAN-197))
USA-076	Definition of “purchase” from <i>The New Shorter Oxford English Dictionary</i> , L. Brown (ed.) (Clarendon Press, 1993, 4 th ed.), Volume 2, p. 2418
USA-077	Government of Canada Counter-Memorial, ICSID Case No. ARB(AF)/12/3 (Aug. 22, 2014) (excerpted)
USA-078	Definition of “group” from Oxford English Dictionary Online
U.S. Responses to the Panel’s Second Set of Questions	
USA-079	Definition of “type” from <i>The New Shorter Oxford English Dictionary</i> , L. Brown (ed.) (Clarendon Press, 1993, 4 th ed.), Volume 2, p. 3441
USA-080	Definition of “function” from <i>The New Shorter Oxford English Dictionary</i> , L. Brown (ed.) (Clarendon Press, 1993, 4 th ed.), Volume 1, p. 1042
USA-081	Definition of “carry out” from <i>The New Shorter Oxford English Dictionary</i> , L. Brown (ed.) (Clarendon Press, 1993, 4 th ed.), Volume 1, p. 343
USA-082	Definition of “normally” from <i>The New Shorter Oxford English Dictionary</i> , L. Brown (ed.) (Clarendon Press, 1993, 4 th ed.), Volume 2, p. 1940
USA-083	Definition of “vested” from <i>The New Shorter Oxford English Dictionary</i> , L. Brown (ed.) (Clarendon Press, 1993, 4 th ed.), Volume 2, p. 3570
USA-084	Government of British Columbia Initial Questionnaire Response (March 14, 2017), Exhibit BC-S-124
USA-085	Government of British Columbia Initial Questionnaire Response (March 14, 2017), Exhibit BC-S-125
USA-086	Government of British Columbia Initial Questionnaire Response (March 14, 2017), Exhibit BC-S-126

Exhibit No.	Description
USA-087 (BCI)	Government of British Columbia Verification Exhibit VER-12
USA-088 (BCI)	Market Memorandum, New Brunswick attachment, Table 2.1
USA-089	Canfor 4th Supplemental Questionnaire Narrative Response (May 31, 2017)
USA-090	USDOC Administrative Protective Order (November 25, 2016)
USA-091	“BC Timber Sales Opportunity Review: Final Report” (Exhibit BC-SUPP3-6 attached to BC Supplemental Questionnaire Response (May 30, 2017))
U.S. Comments on Canada’s Responses to the Panel’s Second Set of Questions	
USA-092 (BCI)	Government of Quebec Verification Exhibit VE-QC-29 (BCI)
USA-093	Government of Nova Scotia Verification Exhibit NS-VE-1 (“Minor Corrections of the Government of Nova Scotia”)

282. To Canada: Please provide the legal document through which the specific harvest blocks belonging to Resolute for which PCIP payment was provided were made subject to the 50 percent partial cutting requirement by Quebec.

U.S. Comment:

1. Canada submits in response to this question both a partial and a complete copy of the harvest agreement between Quebec and Resolute.¹ Canada characterizes this agreement as “the relevant legal document[] that tie[s] Resolute (and other harvesters) to specific harvest blocks, including blocks subject to a partial cut prescription.”² But as Canada notes, this agreement simply “sets out the companies’ harvesting obligations,”³ and the Partial Cut Investment Program (“PCIP”) payments associated with the performance of those obligations constitute a transaction clearly distinct from the provision of stumpage.⁴ Therefore, Canada’s response to the Panel’s question confirms that Resolute’s performance of the legally-required partial cut prescriptions cannot be considered reciprocal or voluntary, because Resolute would have violated the law and terms of its harvest agreement if it had failed to use partial cutting techniques when obligated to do so.⁵

2. The *Sustainable Forest Development Act* (“*SFDA*”) is the overarching law that governs a timber supply guarantee holder’s access to and right to harvest Quebec provincial Crown timber.⁶ Among the obligations established by the *SFDA* and its accompanying regulations is the requirement that timber supply guarantee holders perform and pay all expenses for forest development prescribed by Quebec, including partial cuts on certain harvest stands to allow forest areas to regenerate naturally without the need to replant.

3. Specifically, section 38 of the *SFDA* provides that Quebec “may, by regulation, prescribe sustainable forest development standards for anyone carrying on a forest development activity in a forest in the domain of the State.”⁷ The regulations accompanying the *SFDA* prohibit “any

¹ Quebec Verification Exhibit QC-22 (Exhibit CAN-623 (BCI)); Resolute Questionnaire Response, Exhibit RESB-28 (Exhibit CAN-624 (BCI)).

² Responses of Canada to Additional Questions from the Panel (March 16, 2020) (“Canada’s Responses to the Panel’s Additional Questions”), para. 1.

³ Canada’s Responses to the Panel’s Additional Questions, para. 2.

⁴ See First Written Submission of the United States of America (November 30, 2018) (“U.S. First Written Submission”), paras. 645-646; Responses of the United States to the Panel’s First Set of Questions to the Parties (April 3, 2019) (“U.S. Responses to the First Set of Panel Questions”), para. 406.

⁵ See U.S. Responses to the First Set of Panel Questions, para. 409; Second Written Submission of the United States of America (May 6, 2019) (“U.S. Second Written Submission”), paras. 416-417.

⁶ Government of Quebec, Questionnaire Response (“GOQ QR”), Exhibit QC-STUMP-20 (*SFDA*) (Exhibit CAN-169).

⁷ GOQ QR, Exhibit QC-STUMP-20 (*SFDA*, section 38) (Exhibit CAN-169).

cutting without regeneration and soil protection.”⁸ This prohibition precludes holders of timber supply guarantees from harvesting timber using cost-efficient clear cutting techniques and requires using more costly partial cutting techniques in certain harvest areas.⁹ By law, holders of timber supply guarantees are responsible for harvesting costs.¹⁰

4. Canada does not challenge the determination of the U.S. Department of Commerce (“USDOC”) that Quebec’s PCIP grant exists as a transaction distinct from its provision of stumpage. Quebec obligated Resolute to perform and pay all costs for forest management prescribed by Quebec, including partial cuts on certain harvest stands to allow forest areas to regenerate, as a condition to its access to and right to harvest Quebec provincial Crown timber.¹¹ That Quebec separately extended to Resolute the opportunity to qualify for a PCIP grant to reduce some of the costs incurred for forest management does not transform this grant into a purchase transaction, because the PCIP grant involved the conveyance of funds from Quebec absent a reciprocal obligation on the part of Resolute.¹²

5. The relevant facts and argument as they pertain to Quebec’s decision to provide a financial contribution to Resolute under its PCIP thus are simple and straightforward:

- Resolute was legally responsible for performing and bearing the expense of forest development prescribed by Quebec.¹³
- Resolute’s performance of these legally-required obligations cannot be considered voluntary or reciprocal (*i.e.*, Resolute would have violated the law and its harvest agreement if it had harvested timber from areas in which it was required to use partial cutting techniques without performing

⁸ GOQ QR, Exhibit QC-STUMP-22 (*SFDA Regulations*, chapter A-18.1, r.7, section 89 of the regulation respecting standards of forest management for forests in the domain of the State) (Exhibit USA-075).

⁹ GOQ QR, p. QC-OTHER-18 (Exhibit CAN-204). *See also Memorandum to Gary Taverman from James Maeder Subject: Countervailing Duty Investigation of Certain Softwood Lumber Products from Canada: Issues and Decision Memorandum for the Final Determination* (November 1, 2017) (“Lumber Final I&D Memo”), p. 189 (Exhibit CAN-010).

¹⁰ *See Memorandum to Ronald K. Lorentzen from Gary Taverman Subject: Decision Memorandum for the Preliminary Determination in the Countervailing Duty Investigation of Certain Softwood Lumber Products from Canada* (April 24, 2017) (“Lumber Preliminary Decision Memorandum”), p. 71 (Exhibit CAN-008); Lumber Final I&D Memo, p. 189 (Exhibit CAN-010); GOQ QR, Exhibit QC-STUMP-20 (*SFDA*, section 103.3) (“Subject to subparagraphs 2 and 3 of the third paragraph of section 103.7, holders of a timber supply guarantee are responsible for harvesting the standing timber they purchase.”) (Exhibit CAN-169).

¹¹ *See Lumber Final I&D Memo*, pp. 188-189 (Exhibit CAN-010).

¹² *See Japan – DRAMS (Korea) (AB)*, para. 251 (finding that the provision of a loan and a subsequent interest rate reduction, for instance, should be treated as two separate transactions, each of which may constitute different forms of financial contributions).

¹³ U.S. First Written Submission, paras. 628-629; U.S. Second Written Submission, paras. 416-417.

these obligations).¹⁴

- Resolute separately received payments from Quebec under the PCIP – financial contributions in the form of a direct transfer of funds – that alleviated some of the costs that Resolute incurred with respect to its performance of these obligations.¹⁵
- The USDOC’s conclusion that these payments constituted grants in a manner consistent with Article 1.1(a)(1)(i) of the *Agreement on Subsidies and Countervailing Measures* (“SCM Agreement”), or conferred a benefit on the recipients in the amount of the grants in a manner consistent with Article 1.1(b) or Article 14 of the SCM Agreement, is thus a conclusion that an unbiased and objective investigating authority could have reached in light of the facts and arguments before it.¹⁶

6. In sum, Resolute was legally responsible for performing forest development prescribed by Quebec, including partial cuts on certain harvest blocks, as a condition of its access to and right to harvest Quebec provincial Crown timber. Therefore, the USDOC appropriately found that the PCIP payments are grants, within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement, because Quebec provided a financial contribution to Resolute without an obligation or expectation that anything would be provided to Quebec in return.¹⁷

283. To Canada: Please identify evidence on the record showing that Resolute’s obligation to perform partial cutting and Quebec’s obligation to provide PCIP payments were agreed to as part of the same transaction. Please provide, in particular, (a) TSG agreements between Resolute and Quebec for harvest blocks that were subject to the partial cutting requirement and for which Resolute received PCIP payments; and (b) any other evidence that Canada considers relevant in this respect.

U.S. Comment:

7. As the Panel’s question recognizes, Canada has been unable to identify any record evidence to show that Resolute’s performance of partial cutting techniques for certain harvest blocks and Quebec’s PCIP grants are reciprocal and stem from the same transaction. Canada’s

¹⁴ See U.S. First Written Submission, para. 631; U.S. Second Written Submission, para. 420; Oral Statement of the United States of America at the Second Substantive Meeting of the Panel (October 16, 2019) (“U.S. Second Opening Statement”), paras. 65-66.

¹⁵ See U.S. First Written Submission, paras. 636-648.

¹⁶ See Lumber Preliminary Decision Memorandum, p. 71 (Exhibit CAN-008); Lumber Final I&D Memo, pp. 188-189 (Exhibit CAN-010).

¹⁷ Lumber Preliminary Decision Memorandum, p. 71 (Exhibit CAN-008); Lumber Final I&D Memo, pp. 188-189 (Exhibit CAN-010).

inability to identify such evidence is underscored in its response to this question.

8. The provision of stumpage and PCIP payments constitute two distinct transactions.¹⁸ The first transaction involves the provision of goods (*i.e.*, stumpage), conditioned on the acceptance of certain monetary commitments and other obligations, including partial cut prescriptions on certain harvest blocks.¹⁹ The second transaction involves a direct transfer of funds in the form of a grant (*i.e.*, PCIP payments).²⁰ There was no exchange of rights and obligations relative to this separate transaction, because Resolute was fully obligated to comply with legally mandated partial cut requirements as part of its agreement with Quebec to purchase the right to access and harvest Quebec provincial Crown timber.²¹

9. In its response to this question, Canada takes a different approach than it did in its response to Panel question 282. Here, Canada argues that the Treasury Board’s note, which approved and established the PCIP, contained a reciprocal exchange of rights and obligations.²² Canada’s arguments are unavailing.

10. First, Canada asserts that because the PCIP predates Resolute’s harvest agreement, “Resolute harvests on blocks subject to partial cut prescriptions with the knowledge that Québec will reimburse it for the additional expenses associated with conducting partial cut treatments.”²³ Even if this were true, and Canada fails to cite evidence of Resolute’s decision-making process, the fact that Resolute may have been influenced by the existence of the PCIP does not mean that the PCIP payments involved a reciprocal exchange of rights and obligations. It only means that Resolute decided to harvest blocks subject to partial cut prescriptions with the expectation that it would receive a grant from Quebec that would alleviate some of the costs associated with its performance of a legally-required obligation.

11. Second, Canada argues that the Panel should attach importance to the Treasury Board’s belief that partial cutting may not have been carried out in the absence of financial assistance.²⁴ Even if this were true, such a belief would not alter the fact that the PCIP payments constitute a grant under Article 1.1(a)(1)(i) of the SCM Agreement. As the United States explained in response to Panel question 131, the underlying reasons that motivate a government to establish a grant program do not change the fact that payments made pursuant to such a program constitute

¹⁸ See U.S. First Written Submission, paras. 645-646; U.S. Responses to the First Set of Panel Questions, para. 406.

¹⁹ See U.S. First Written Submission, paras. 645-646.

²⁰ See U.S. First Written Submission, paras. 645-646.

²¹ See *supra*, U.S. comments on Canada’s response to question 282; U.S. First Written Submission, paras. 645-646.

²² Canada’s Responses to the Panel’s Additional Questions, para. 8.

²³ Canada’s Responses to the Panel’s Additional Questions, para. 8. See also *ibid.*, para. 6 (“The fact that partial cut prescriptions lead to additional costs that are partially reimbursed is therefore taken into account by bidders when making their bids for an auction block subject to partial cut treatments.”).

²⁴ Canada’s Responses to the Panel’s Additional Questions, para. 8.

direct transfers of funds in the form of grants.²⁵ Therefore, while the PCIP may have, as assumed by the Treasury Board’s note, helped “to ensure the realization of partial cutting,”²⁶ this does not change the fact that Resolute was legally obligated to use a partial cutting technique in the applicable harvest areas, or that Resolute’s failure to use such a technique would constitute a violation of this legal obligation.²⁷

12. Finally, Canada argues that the PCIP payment “is processed as a credit against Resolute’s stumpage invoice.”²⁸ This argument elevates form over substance. That the PCIP payments are applied against outstanding stumpage fees does not alter the fact that the PCIP payments are not part of Resolute’s stumpage fee. By applying the PCIP payments against outstanding stumpage fees, Quebec merely exercises its legal right to protect the government’s revenue by first collecting all debts owed by a timber supply guarantee holder before issuing payment.²⁹

13. Canada bears the burden of demonstrating that the U.S. measures within the Panel’s terms of reference are inconsistent with the provisions of a WTO covered agreement. As the United States has repeatedly demonstrated, none of Canada’s arguments establish that the USDOC’s financial contribution and benefit determinations regarding Quebec’s PCIP payments are inconsistent with Article 1.1(a)(1), Article 1.1(b), or Article 14 of the SCM Agreement. Quebec legally obligated Resolute to harvest certain timber stands using a partial cutting technique as a condition of the provision of stumpage. The PCIP payments exist as transactions distinct from this provision, and there was no exchange of rights and obligations in respect of these payments. The USDOC’s conclusions that the PCIP payments constitute financial contributions in the form of grants that conferred a benefit on Resolute are clearly conclusions an unbiased and objective investigating authority could have reached in light of the facts and arguments before it.

284. To both parties: At page 147 of the Final Determination, in context of its analysis on whether log export regulations in British Columbia impacted sawmills located in British Columbia interior, the USDOC noted:

The GOC/GBC have not argued that the log market in the tidewater portion of the interior is a separate market unique from the rest of the interior.

In contrast, at paragraph 209 of its first written submission, Canada argues pointing to record evidence that:

[T]he Tidewater is economically, geographically, and

²⁵ See U.S. Responses to the First Set of Panel Questions, paras. 408-409.

²⁶ GOQ QR, Exhibit QC-OTHER-13 (PCIP), p. 9 (Exhibit CAN-208).

²⁷ See U.S. Responses to the First Set of Panel Questions, paras. 408-409. See also U.S. Second Written Submission, para. 421.

²⁸ Canada’s Responses to the Panel’s Additional Questions, para. 9.

²⁹ GOQ QR, Exhibit QC-OTHER-18, p. 6 (Exhibit CAN-388).

ecologically distinct from the B.C. Interior. Its access to water-borne transportation, species mix—both in terms of harvest and export volumes—and geographic characteristics are such that it is far more similar to the Coast.

Please explain the contradiction between the two observations quoted above. Please comment on whether the USDOC ought to have treated the tidewater region of British Columbia as a market distinct from the rest of British Columbia interior, and should therefore not have considered exports from tidewater region as being representative of exports from the interior.

U.S. Comment:

14. In its response to this question, Canada appears implicitly to acknowledge that the Governments of Canada and British Columbia did not argue before the USDOC that the log market in the tidewater portion of the interior is a separate market unique from the rest of the interior. Canada does not suggest that the USDOC incorrectly characterized the arguments made by the Governments of Canada and British Columbia. Rather, Canada contends that, “[b]ased on the evidence before it, [the USDOC] should not have considered exports from the Tidewater region as being representative of exports from the rest of the Interior, regardless of how Canada and British Columbia referred to the Tidewater region.”³⁰ Beyond this contention, though, Canada does not otherwise reconcile or explain the divergence between the argument that it is making to the Panel and the argument that Canada made to the USDOC. The fact that Canada and British Columbia did not even make this argument in the underlying investigation supports a conclusion that an unbiased and objective investigating authority could have found that these were not separate markets. And, in any event, Canada’s contention lacks merit.

15. First, as explained in the U.S. response to this question,³¹ it is incorrect to suggest, as the question appears to do, that the USDOC considered exports from the tidewater region alone – to the exclusion of other exports from the interior – as being representative of exports from the interior. The USDOC took into account all log exports from the interior, explained how it did so, and gave its reasons for and pointed to the evidence that supported its conclusion. Thus, Canada’s contention that the USDOC “should not have considered exports from the Tidewater region as being representative of exports from the rest of the Interior” rests on a false premise.³²

16. Second, Canada contends that the USDOC “ignore[d] the relevant evidence submitted by Canada and British Columbia”³³ and “failed to grapple with evidence that contradicted its

³⁰ Canada’s Responses to the Panel’s Additional Questions, para. 10 (underline added).

³¹ See Responses of the United States to the Panel’s Additional Questions to the Parties (March 16, 2020) (“U.S. Responses to the Panel’s Additional Questions”), paras. 5-8.

³² Canada’s Responses to the Panel’s Additional Questions, para. 10.

³³ Canada’s Responses to the Panel’s Additional Questions, para. 10.

finding that the impact would ‘ripple’ through to the rest of the Interior.”³⁴ In making these contentions, Canada simply repeats arguments that it has made throughout the dispute, which the United States already has demonstrated lack any merit. The United States will not likewise repeat at length arguments that it already has presented to the Panel. Rather, the United States would respectfully refer the Panel to prior U.S. submissions, statements, and responses, in particular the U.S. response to question 158. That response addresses the USDOC’s consideration of the Kalt report and the USDOC’s explanation of its reasons for disagreeing with that report, including the USDOC’s discussion of the ripple effect, differences in species in different areas, the existence of transportation routes, and the feasibility of transporting logs for export.³⁵ The USDOC also discussed in the final issues and decision memorandum the Bustard report, to which Canada refers in its response to this question.³⁶ The USDOC actually relied on the Bustard report for information concerning the maximum distance up to which it is economically feasible to transport logs.³⁷

17. Far from ignoring the evidence on the record, the USDOC engaged with the evidence and based its conclusions on its analysis of that evidence. Canada simply does not like the conclusions that the USDOC reached, and Canada is attempting to persuade the Panel to disagree with those conclusions and use that as a basis to find against the United States.

18. That, of course, is not the role of the Panel. Once again, Canada invites the Panel to apply an incorrect standard of review. The Panel’s role, as has been articulated in prior reports, is to assess “whether the investigating authorities properly established the facts and evaluated them in an unbiased and objective manner”, *i.e.*, to examine whether the findings reached in the investigation are those that an unbiased and objective investigating authority could have reached.³⁸ Put differently, the Panel’s role 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. Indeed, it would be inconsistent with a panel’s function under Article 11 of the DSU to go beyond its role as reviewer and instead substitute its own assessment of the evidence and judgment for that of the investigating authority.³⁹

19. For the reasons the United States has given in its response to this question, in these comments, and in prior submissions, statements, and responses, the evidence did not support the

³⁴ Canada’s Responses to the Panel’s Additional Questions, para. 17.

³⁵ See Responses of the United States to the Panel’s Second Set of Questions to the Parties (November 12, 2019) (“U.S. Responses to the Second Set of Panel Questions”), paras. 37-41.

³⁶ See Canada’s Responses to the Panel’s Additional Questions, para. 12.

³⁷ See Lumber Final I&D Memo, pp. 147-148 and footnote 886.

³⁸ *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC) (Panel)*, para. 7.82. See also *ibid.*, paras. 7.78-7.83; *US – Tyres (China) (AB)*, para. 123; *US – Cotton Yarn (AB)*, para. 74; *US – Supercalendered Paper (Panel)*, paras. 7.40, 7.150, 7.202; *US – Coated Paper (Indonesia) (Panel)*, paras. 7.61, 7.83; *US – Countervailing Measures (China) (Panel)*, para. 7.382; *China – GOES (Panel)*, paras. 7.51-7.52; *EC – Countervailing Measures on DRAM Chips (Panel)*, paras. 7.335, 7.373.

³⁹ *US – Countervailing Duty Investigation on DRAMS (AB)*, paras. 188-190.

USDOC treating the tidewater region of British Columbia as a market distinct from the rest of the British Columbia interior. Regardless of any suggestion to the contrary, the USDOC did not consider exports from the tidewater region alone – to the exclusion of other exports from the interior – as being representative of exports from the interior. The USDOC took into account all log exports from the interior, explained how it did so, and gave its reasons for and pointed to the evidence that supported its conclusion. In sum, the USDOC made a determination that an unbiased and objective investigating authority could have made in light of the facts and arguments before it.

285. In the underlying investigation the USDOC concluded that it would not be more accurate to convert the Washington log benchmark price using a conversion factor derived from trees in British Columbia because the Washington state price in cubic meters would be based upon the cubic meters of the tree in Washington state, not British Columbia.

In paragraphs 647-649 of its first written submission, Canada contends, using mock examples, that the application of a conversion factor based on Eastside Washington logs (which is understated) to the British Columbia interior harvest overstates the volume of logs that entered mills in British Columbia during the period of investigation. Based on these examples, Canada states in paragraph 650 of its first written submission that it is crucial that the conversion factors accurately reflect the volumetric characteristics of the logs to which the conversion factor is to be applied.

c. In paragraph 693 of its first written submission, Canada contends that to suggest as the USDOC did that it would be more accurate to convert a Washington state per-unit price with a conversion factor derived from Washington logs reflects either a fundamental misunderstanding of the application of a volumetric conversion in the context of USDOC’s own cross-border methodology, or a thinly-veiled attempt to obscure the fact that the only log volumes that were being converted were the BC log volumes subject to this investigation.

b. To Canada. Please explain why Canada would disagree with the USDOC’s view, set out in page 60 of its final determination (Exhibit CAN-10), that the Washington state price in cubic meters would be based upon the cubic meters of the tree in Washington state, not British Columbia.

U.S. Comment:

20. Contrary to Canada’s contention, the USDOC never asserted that the BC Dual-Scale Study measured the “wrong logs” nor that it was unreliable because it measured the “wrong logs.”⁴⁰ Rather, as the United States has explained repeatedly in its submissions to the Panel, the

⁴⁰ Canada’s Responses to the Panel’s Additional Questions, para. 19.

USDOC’s decision not to use the BC Dual-Scale Study was based on several other factors. First, because the BC Dual-Scale Study was prepared specifically for the investigation, the USDOC was concerned that the study could be tailored to reach specific conclusions.⁴¹ In examining whether such bias existed in the BC Dual-Scale Study, the USDOC examined whether the conversion factors produced by the study were based on a valid sampling methodology.⁴² Because the BC Dual-Scale Study lacked any explanation of the sampling methodology used to select the 13 scaling sites – beyond the “historic knowledge” of Mr. Jendro and Mr. Hart – the USDOC could not ensure that the sites were representative of potential other locations and not selected to generate particular results.⁴³

21. The USDOC’s rejection of the BC Dual-Scale Study is not at all, as Canada implies, inconsistent with its acknowledgment of the qualifications of Mr. Jendro and Mr. Hart and the scaling professionals they employed.⁴⁴ The credentials a particular expert holds, and the works they produce, are two separate issues. The fact that Mr. Jendro and Mr. Hart are experienced in their field does not automatically mean that every study they generate will contain an explanation of the sampling methodologies they employed. In this case, the BC Dual-Scale Study did not. As the USDOC explained: “While we do not question the qualifications of Mr. Jendro and Mr. Hart, or the scaling professionals used by Jendro & Hart LLC, we have serious concerns about the methodology used to identify the selected scaling sites.”⁴⁵ Acknowledgement of Mr. Jendro and Mr. Hart’s qualifications in no way undermines or contradicts the USDOC’s conclusion that the BC Dual-Scale Study was unreliable.

22. The U.S. Forest Service (“USFS”) Study, which provided the only usable conversion factor on the record, did not raise such concerns about bias because it was produced by a U.S. government entity that was not a party to the investigation.⁴⁶ An additional reason the USDOC considered the conversion factor in the USFS Study to be appropriate was because it was based on trees in Washington State, which is where the benchmark prices were derived.⁴⁷ As the USDOC explained:

On this record, we have a Washington state-priced benchmark that is in board feet and we need to convert that price to cubic meters. The Washington state price in cubic meters would be based upon the cubic meters of the tree in Washington state, not BC. Therefore, we do not agree with the proposal that it would be more accurate to convert the Washington state benchmark prices using a

⁴¹ Lumber Final I&D Memo, pp. 59-60 (Exhibit CAN-010).

⁴² Lumber Final I&D Memo, p. 59 (Exhibit CAN-010).

⁴³ Lumber Final I&D Memo, pp. 59-60 (Exhibit CAN-010).

⁴⁴ Canada’s Responses to the Panel’s Additional Questions, para. 19.

⁴⁵ Lumber Final I&D Memo, p. 59 (Exhibit CAN-010).

⁴⁶ Lumber Final I&D Memo, p. 60 (Exhibit CAN-010).

⁴⁷ Lumber Final I&D Memo, p. 60 (Exhibit CAN-010).

conversion factor derived from trees in BC, especially given that we have a conversion factor on the record that is based on trees in Washington state.⁴⁸

Therefore, the USDOC’s decision to use the USFS Study, rather than the BC Dual-Scale Study, was not based on the simple conclusion that the BC Dual-Scale Study measured the “wrong logs.”⁴⁹ Rather, the USDOC reasonably concluded: “[G]iven our concerns with the lack of a valid sampling methodology used to produce the data in the BC Dual Scale Study and the applicability of a conversion factor based on BC trees used on a price for Washington trees, we have not relied on the information in the BC Dual Scale Study.”⁵⁰

23. Canada’s objection to the use of the USFS Study is based on the faulty premise that the characteristics of trees in the British Columbia Interior and Washington state are so dissimilar that the USFS conversion factor will yield inaccurate price comparisons.⁵¹ As the United States explained in detail in its response to subpart (a) of question 285, the USDOC determined that the Washington Department of Natural Resources (“WDNR”) price data for the interior of Washington state provided an appropriate benchmark because the growing conditions and species – including those harvested by the British Columbia respondents – in the Washington interior and British Columbia are similar.⁵² The United States also explained that because the benchmark was based on prices for Washington state logs, not those in British Columbia, it was appropriate to use a conversion factor based on Washington trees to translate the Washington state-priced benchmark expressed in board feet into prices per cubic meter reported by the British Columbia respondents.⁵³

24. Canada’s response continues to suggest the misapprehension that the USDOC applied a conversion factor to logs in British Columbia.⁵⁴ As the United States explained in its response to question 285, the USDOC never converted British Columbia log volumes at any point in its

⁴⁸ Lumber Final I&D Memo, pp. 60-61 (Exhibit CAN-010).

⁴⁹ Canada’s Responses to the Panel’s Additional Questions, para. 19.

⁵⁰ Lumber Final I&D Memo, p. 61 (Exhibit CAN-010).

⁵¹ Canada’s Responses to the Panel’s Additional Questions, paras. 20-24.

⁵² U.S. Responses to the Panel’s Additional Questions, para. 16.

⁵³ U.S. Responses to the Panel’s Additional Questions, para. 15.

⁵⁴ *See, e.g.*, Canada’s Responses to the Panel’s Additional Questions, para. 22 (the USFS conversion factor “will necessarily lead to an inflated benefit in all instances as Commerce’s Eastern Washington conversion factor understates the actual conversion factor for B.C. Interior logs”); and para. 23 (“The conversion required in the cross-border comparison is...to identify the volume of the B.C. Interior logs as if they had been measured using the Scribner Scale. Accordingly, it is the Scribner Scale volume of B.C. Interior logs that must be determined in order to make a comparison with an Eastern Washington log price benchmark denominated in Scribner Scale.”). Each of these statements is incorrect. These assertions are neither supported by the text of Article 14(d) of the SCM Agreement nor is there an evidentiary basis for them. *See* U.S. Responses to the Panel’s Additional Questions, paras. 12-22.

calculation.⁵⁵ Rather, the USDOC converted the Washington state benchmark, expressed in U.S. dollars per thousands of board feet (MBF), into cubic meters in order to compare the benchmark price to the British Columbia interior purchases, which were reported in cubic meters.⁵⁶ The USDOC did not apply the conversion factor to logs in British Columbia.⁵⁷

25. The similarity of the trees in Washington state and the interior of British Columbia also reinforces the appropriateness of the conversion factor in the USFS Study.⁵⁸ The USDOC added further precision to the conversion factor by using the 5.93 cubic meters per MBF USFS conversion factor applicable to the Washington state interior, which contained trees that were most similar to those in the British Columbia interior where respondents were located, as opposed to the USFS conversion factor of 6.76 for trees in coastal Washington.⁵⁹

26. Furthermore, contrary to Canada’s contentions,⁶⁰ the USDOC made several adjustments to the Washington state log benchmark price to reflect prevailing market conditions in British Columbia, including for cutting rights fees and costs for access, harvesting, hauling, silviculture, and forest management.⁶¹ Although Canada asserts that the USDOC did not account for beetle-kill in its benchmark selection and conversions,⁶² the USDOC explained in the final issues and decision memorandum that the respondents “have not provided evidence that blue-stained timber prices are not already included in the U.S. PNW log price benchmarks, nor have parties provided other reliable blue-stained timber prices.”⁶³

- c. **To Canada. If the conversion rate of logs in Washington from MBF to cubic meters (or vice versa) is different from the conversion rate of logs in British Columbia, how would be it accurate to convert the log price per MBF in Washington state, based on trees in Washington, to cubic meters with a conversion rate derived from trees in British Columbia?**

U.S. Comment:

27. The United States disagrees with Canada’s assertion that the only accurate conversion

⁵⁵ U.S. Responses to the Panel’s Additional Questions, para. 30.

⁵⁶ U.S. Responses to the Panel’s Additional Questions, para. 30.

⁵⁷ U.S. Responses to the Panel’s Additional Questions, para. 30.

⁵⁸ U.S. Responses to the Panel’s Additional Questions, para. 27.

⁵⁹ U.S. Responses to the Panel’s Additional Questions, para. 27.

⁶⁰ Canada’s Responses to the Panel’s Additional Questions, para. 21.

⁶¹ U.S. Responses to the Panel’s Additional Questions, para. 25.

⁶² Canada’s Responses to the Panel’s Additional Questions, paras. 22 and 24.

⁶³ Lumber Final I&D Memo, p. 64 (Exhibit CAN-010).

factor would be one based on logs from British Columbia.⁶⁴ As the United States explained above and in its responses to question 285, the best benchmark information on the record was the WDNR data, which was based on price quotes for logs in Washington state.⁶⁵ Nevertheless, because the log prices published by the WDNR are expressed in U.S. dollars per MBF, and the reported purchase prices of the British Columbia respondents are stated in cubic meters, the USDOC needed to convert the WDNR U.S. prices into cubic meters.⁶⁶ Because the benchmark is based on Washington state prices, “[t]he Washington state price in cubic meters would be based upon the cubic meters of the tree in Washington state, not BC.”⁶⁷ Furthermore, as explained above, both the WDNR prices and the USFS conversion factor were based on Washington state trees that were of a similar species and growing conditions as the timber harvested by the British Columbia respondents in the interior.⁶⁸ Therefore, the USDOC reasonably concluded that “we do not agree with the proposal that it would be more accurate to convert the Washington state benchmark prices using a conversion factor derived from trees in BC, especially given that we have a conversion factor on the record that is based on trees in Washington state.”⁶⁹

⁶⁴ Canada’s Responses to the Panel’s Additional Questions, paras. 25-26.

⁶⁵ *See supra*, U.S. comments on Canada’s response to question 285(c)(b); U.S. Responses to the Panel’s Additional Questions, para. 17.

⁶⁶ U.S. Responses to the Panel’s Additional Questions, para. 18.

⁶⁷ Lumber Final I&D Memo, p. 60 (Exhibit CAN-010).

⁶⁸ *See supra*, U.S. comments on Canada’s response to question 285(c)(b).

⁶⁹ Lumber Final I&D Memo, pp. 60-61 (Exhibit CAN-010).