UNITED STATES – COUNTERVAILING DUTY MEASURES ON SOFTWOOD LUMBER FROM CANADA

(DS533)

INTEGRATED EXECUTIVE SUMMARY OF THE UNITED STATES OF AMERICA

December 11, 2019

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 <u>would</u> 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 <u>are market determined</u> <u>such that</u> they can be used to determine whether remuneration is less than adequate." The primary benchmark, and "therefore the <u>starting point</u> 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 <u>necessarily</u> 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 some 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 <u>require</u> 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 <u>compels</u> 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. <u>by virtue of the type of activities conducted by the recipients</u> 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 <u>same</u> 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.