UNITED STATES – COUNTERVAILING DUTY MEASURES
ON SOFTWOOD LUMBER FROM CANADA

(DS533)

OPENING STATEMENT OF THE UNITED STATES OF AMERICA ON THE FIRST DAY OF THE FIRST SUBSTANTIVE MEETING OF THE PANEL

February 26, 2019

TABLE OF REPORTS

Short Form	Full Citation
Canada – Aircraft (AB)	Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999
China – GOES (Panel)	Panel Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/R and Add.1, adopted 16 November 2012, upheld by Appellate Body Report WT/DS414/AB/R
EC – Countervailing Measures on DRAM Chips (Panel)	Panel Report, *European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea*, WT/DS299/R, adopted 3 August 2005
US – Anti-Dumping and Countervailing Duties (China) (Panel)	Panel Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/R, adopted 25 March 2011, as modified by Appellate Body Report WT/DS379/AB/R
US – Anti-Dumping and Countervailing Duties (China) (AB)	Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R, adopted 25 March 2011
US – Carbon Steel (India) (Panel)	Panel Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/R, adopted 19 December 2014, as modified by Appellate Body Report, WT/DS/436/AB
US – Carbon Steel (India) (AB)	Appellate Body Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/AB/R, adopted 19 December 2014
US – Coated Paper (Indonesia) (Panel)	Panel Report, *United States – Anti-Dumping and Countervailing Measures on Certain Coated Paper from Indonesia*, WT/DS491/R and Add.1, adopted 22 January 2018
US – Countervailing Duty Investigation on DRAMS (AB)	Appellate Body Report, *United States – Countervailing Duty Investigation on Dynamic Random Access Memory Semiconductors (DRAMS) from Korea*, WT/DS296/AB/R, adopted 20 July 2005
US – Countervailing Measures (China) (Panel)	Panel Report, *United States – Countervailing Duty Measures on Certain Products from China*, WT/DS437/R and Add.1, adopted 16 January 2015

Short Form	Full Citation
US – Countervailing Measures (China) (AB)	Appellate Body Report, *United States – Countervailing Duty Measures on Certain Products from China*, WT/DS437/AB/R, adopted 16 January 2015
US – Countervailing Measures on Certain EC Products (Article 21.5 – EC) (Panel)	Panel Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS212/RW, adopted 27 September 2005
US – Softwood Lumber IV (AB)	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, adopted 17 February 2004, as modified by Appellate Body Report WT/DS257/AB/R
US – Supercalendered Paper (Panel)	Panel Report, *United States – Countervailing Measures on Supercalendered Paper from Canada*, WT/DS505/R and Add. 1, circulated 5 July 2018

Madame Chairperson, members of the Panel:

1. The United States thanks you for agreeing to serve on this Panel, and we would like to express our gratitude as well to the Secretariat staff assisting you with your work. The United States appreciates this opportunity to present its views on the issues in this dispute.

2. Canada has placed before the Panel most of the documents on the administrative record of the countervailing duty proceeding conducted by the U.S. Department of Commerce ("USDOC"). This morning, Canada's delegates spoke for nearly two and a half hours, offering a multimedia presentation that referenced copious documents from the record and presented images of trees, forests, maps, lumber mills, and lumber workers. Through an emotional appeal, based not on the terms of the SCM Agreement[1] to which Canada has agreed, but instead based on what the Softwood Lumber Litigation Division of Canada's foreign affairs ministry considers "fair" or "reasonable", Canada seeks to have the Panel reweigh the evidence examined by the USDOC, and Canada asks the Panel, in the compressed time period and format of a WTO dispute settlement proceeding, to make its own determination that Canadian softwood lumber is not subsidized. But that is not the role of WTO dispute settlement panels. Canada's approach is contrary to the DSU.[2]

3. Under the standard set forth in Article 11 of the DSU, as explained in numerous prior panel and Appellate Body reports, the Panel's task in this dispute is not to determine whether softwood lumber products from Canada were subsidized, or what was the amount of the benefit conferred, or whether the subsidies were specific. 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*."[3] The Panel's role here is to assess whether the USDOC "properly established the facts and evaluated them in an unbiased and objective manner."[4] The question is not what Canada believes is "fair" or "reasonable", but what do the terms of the SCM Agreement require? In short, the Panel's task in this dispute is to determine whether an objective, unbiased person, looking at the same evidentiary record as the USDOC, <u>could</u> have – not would have – reached the same conclusions that the USDOC reached.

4. As demonstrated in the U.S. first written submission, when the Panel reviews the USDOC's determination in the countervailing duty investigation of softwood lumber products from Canada, the Panel will see that the USDOC's determination accords with the requirements of the SCM Agreement, properly interpreted pursuant to customary rules of interpretation. The Panel also will see that the USDOC provided a reasoned and adequate explanation for its determination; the USDOC's determination is based on ample evidence; and the USDOC's

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[1] *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement").

[2] *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU").

[3] *US – Countervailing Duty Investigation on DRAMS (AB)*, paras. 187-188 (italics in original).

[4] *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC) (Panel)*, para. 7.82. *See also ibid.*, paras. 7.78-7.83; *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.

conclusion in the investigation is, indeed, one that any unbiased and objective investigating authority could have reached.

I. CANADA'S CLAIMS UNDER ARTICLES 1.1(B) AND 14(D) OF THE SCM AGREEMENT REGARDING THE PROVISION OF PROVINCIAL STUMPAGE FOR LESS THAN ADEQUATE REMUNERATION

5. Turning now to the issues identified for today's discussion in the agenda provided by the Panel, we focus the remainder of our oral statement on Canada's claims regarding the provision of stumpage rights to Canadian lumber producers for less than adequate remuneration.

A. Canada's Proposed Interpretation of Article 14(d) Is Inconsistent with the Text and Prior Interpretations of that Provision

6. As the United States demonstrated in its first written submission, Canada's claims under Articles 1.1(b) and 14(d) of the SCM Agreement are based on a flawed understanding of those provisions and a failure to discern between which facts are relevant and which facts are not relevant to the proper application of Article 14(d).

7. 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) states 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."[5]

8. Canada's approach is flawed because it substitutes the non-treaty terms "in-market" and "jurisdiction" for words that appear in the text.[6] 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." And what this means is 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 the customary rules of interpretation and cannot be accepted.

9. 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."[7] 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

[5] Art. 14(d), SCM Agreement.

[6] *See, e.g.*, Canada's First Written Submission, paras. 52-55 and 264.

[7] *US – Carbon Steel (India) (AB)*, para. 4.152 (underline added).

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]

10. Indeed, the Appellate Body has been clear that "in-country prices [that] are market determined . . . would necessarily have the requisite connection with the prevailing market conditions in the country of provision that is prescribed by the second sentence of Article 14(d)."[9] 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).

11. And here is the second flaw in Canada's claim. 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. Canada argues that any number of differences could be taken into account when comparing one forest to another. But as a matter of fact, none of the provincial governments recognize differences between specific spruce, pine, and fir ("SPF") species, despite what Canada argues.[10] Rather, the evidence of record demonstrated that SPF timber was treated as a single category for data collection and pricing purposes by provincial governments.[11] 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.[12] And for New Brunswick, of course, Canada does not dispute that the stumpage market in Nova Scotia reflects prevailing market conditions in New Brunswick.[13]

12. 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.[14] 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

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[8] *US – Carbon Steel (India) (AB)*, para. 4.154 (italics in original). *See also US – Softwood Lumber IV (AB)*, para. 90.

[9] *US – Countervailing Measures (China) (AB)*, para. 4.46 (internal citations omitted).

[10] *See* GOA IQR at ABIV-34 (timber dues rates set uniformly for "coniferous timber'') (Exhibit CAN-097); GNB IQR at NBII-6 (Crown timber prices for "SPF Sawlogs" and "SPF Studwood & Lathwood") (Exhibit CAN-240 (BCI)); Lumber Final I&D Memo, p. 110 (single price for "Spruce/Jack Pine/Scots Pine/Balsam Fir/Larch") (citing Petition Exhibit 181 "Ontario Crown Timber Charges for Forestry Companies") (Exhibit CAN-010); *ibid.* (describing equation to set stumpage "for SPFL") (citing GOQ IQR at QC-S-37) (Exhibit CAN-010). *See also* Lumber Preliminary Decision Memorandum, p. 44 (Exhibit CAN-008).

[11] Lumber Final I&D Memo, p. 110 (Exhibit CAN-010).

[12] Lumber Final I&D Memo, pp. 110-111, 113 (citing GOA QR at ABIV-73 and Exhibit AB-S-15 at 73; GNB QR at NBII-6 to NBII-9; GOO QR at Exhibit ON-TEN-34; GOQ QR Vol. 1 at 53) (Exhibit CAN-010).

[13] *See* Canada's First Written Submission, para. 600; U.S. First Written Submission, para. 115, n.138. As noted, for New Brunswick, the USDOC used the respondent's own purchase data for stumpage the respondent purchased in Nova Scotia. *See* Lumber Final I&D Memo, pp. 107-123 (Exhibit CAN-010).

[14] Lumber Final I&D Memo, pp. 110-111, 113 (Exhibit CAN-010).

in Quebec,[15] and also was "by far the predominant group of trees harvested in Nova Scotia."[16] 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".[17]

13. Thus, while Canada has posed a laundry list of questions it would like to have considered in this panel proceeding, the USDOC's determination is based on evidence of the provinces' own practices – and those practices call for the SPF-wide comparison of provincial stumpage prices. 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.

14. In addition to (and consistent with) this evidence, the USDOC found that Nova Scotia stumpage prices reflected prevailing market conditions in Alberta, Ontario, 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.[18]

15. As demonstrated in the U.S. first written submission, 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.

16. A third problem with Canada's position that benchmark selection should have been limited to regional jurisdictions is that Canada has never established that such regional divisions even exist. On the one hand, Canada argues that the conditions in one province cannot be compared to conditions in another province because the government pricing mechanism in each province creates province-specific conditions. On the other hand, Canada argues that the relevant market conditions "vary significantly" across even the smallest distances, *e.g.*, "even at the level of individual mills located within the same state, owned by the same company, and within an hour and a half haul of each other."[19] 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 as we explained in the U.S. first written submission, 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

[15] Lumber Preliminary Decision Memorandum, p. 45 (Exhibit CAN-008).

[16] GNS QR, p. 7 (Exhibit CAN-313).

[17] Lumber Final I&D Memo, pp. 110-111, 113 (Exhibit CAN-010).

[18] Lumber Preliminary Decision Memorandum, p. 45 (Exhibit CAN-008); Lumber Final I&D Memo, pp. 109-112 (Exhibit CAN-010).

[19] Canada's First Written Submission, para. 616.

own "market" is that each provincial government sets different pricing policies within its jurisdiction. And ultimately, as we have explained, the provincial stumpage pricing policies do not constitute "prevailing market conditions" within the meaning of Article 14(d).

17. By overlooking this important understanding, Canada mistakenly characterizes price distortion as itself constituting a "prevailing market condition." In doing so, Canada reverses the logical order of the analysis. As the USDOC explained, the "analysis of whether a proposed benchmark is market-determined must precede any analysis of how to account for prevailing market conditions in a benchmark comparison."[20] Reversing the order of that analysis "would lead to the absurd result that the Department could never rely on anything other than [an in-country benchmark], regardless of the level of distortion, because such benchmarks would always reflect 'prevailing market conditions' in the country of provision."[21] That result "would effectively nullify" the language in Article 14(d) that guides the determination of adequate remuneration.[22]

18. 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).[23]

19. 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 –*

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[20] Lumber Final I&D Memo, Comment 16, p. 52 (Exhibit CAN-010) (underline added).

[21] Lumber Final I&D Memo, Comment 16, p. 52 (Exhibit CAN-010) (underline added).

[22] Lumber Final I&D Memo, Comment 16, pp. 52 (Exhibit CAN-010).

[23] *See, e.g.*, *US – Softwood Lumber IV (AB)*, paras. 93 and 100; *US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 10.44 ("to require an effectively circular price comparison in such a situation is not supported by the objective of Article 14 which, as indicated by its title, deals with the calculation of the amount of a subsidy in terms of the benefit to the recipient"); *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 446 ("an investigating authority may reject in-country private prices" to avoid "rendering the comparison required under Article 14(d) of the SCM Agreement circular"); *US – Carbon Steel (India) (Panel)*, para. 7.39 ("it would be circular, and therefore uninformative, to include the government price for the good provided by the government in the establishment of the market benchmark when assessing whether such governmental provision confers a benefit"); *US – Carbon Steel (India) (AB)*, para. 4.155 ("The Appellate Body [in *US – Softwood Lumber IV*] reasoned that, in such a situation, 'there may be little difference, if any, between the government price and the private prices' in the country of provision. In other words, 'the government's role in providing the financial contribution [may be] so predominant that it effectively determines the price at which private suppliers sell the same or similar goods, so that the comparison contemplated by Article 14 would become circular.' . . . . Article 14(d) 'ensures that the provision's purposes are not frustrated in such situations' by permitting investigating authorities to use an alternative benchmark to in country private prices."); *US – Countervailing Measures (China) (AB)*, para. 4.50 (same); and *US – Coated Paper (Indonesia) (Panel)*, paras. 7.34, 7.69-7.70, and 7.76.

Aircraft with respect to Article 1.1(b).[24] It is not for the provider of the subsidy but rather for the market to determine what the value of the input is.[25] 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.

B. The Record Demonstrates that Stumpage Prices in Alberta, New Brunswick, Ontario, and Quebec Were Distorted

20. We now turn to Canada's argument that, by using in-country prices from Nova Scotia, the USDOC did not meet the standard the Appellate Body has applied for out-of-country benchmarks. That standard does not apply here and, as a result, Canada cannot demonstrate any inconsistency with Article 14(d) on this basis.

21. As explained, Article 14(d) does not require a special showing of distortion as a prerequisite for using in-country benchmarks.[26] And 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 Canada's claim any further. Nonetheless, we address Canada's arguments regarding the USDOC's determinations that provincial stumpage markets in Alberta, New Brunswick, Ontario, and Quebec were distorted, and, thus, did not yield market-determined prices.

22. The Appellate Body has been clear that, 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.[27] 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 the distortion of private prices.[28] Accordingly, the Appellate Body has found that "[t]here may be cases . . . where the government's role as provider of goods is so predominant that price distortion is likely and other evidence carries only limited weight."[29] And that is the case here.

23. In this case, 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.[30] Canada argues that this overwhelming predominance should not alone be dispositive. But the USDOC's determination speaks for itself – the mere fact of

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[24] *See Canada – Aircraft (AB)*, paras. 153-158.

[25] *See Canada – Aircraft (AB)*, paras. 153-158.

[26] *See* U.S. First Written Submission, para. 83.

[27] *US – Softwood Lumber IV (AB)*, para. 102; *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 453; *US – Carbon Steel (India) (AB)*, para. 4.156; *US – Countervailing Measures (China) (AB)*, para. 4.51.

[28] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 444.

[29] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 446.

[30] GOC IQR at Exhibit GOC-Stump-5 (Exhibit CAN-014); Preliminary Decision Memorandum, pp. 24-25 (Exhibit CAN-008).

predominance, even at levels as high as 90 percent or more – was not the sole basis for Commerce's determinations.

24. 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, as we explained in our first written submission, 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). We highlight these for the Panel now.

1. New Brunswick

25. 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.[31] 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.[32] 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.[33] 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."[34]

26. The USDOC did not rely on these official reports alone, however. The USDOC also considered evidence that, while producers in New Brunswick may be granted multi-year, non-transferable tenure rights to harvest Crown timber, they chose not to consume a significant volume of their allocated Crown timber, 53 percent, and this dynamic disincentivized producers from purchasing private timber priced at or above the provincial-set prices for Crown timber. The USDOC ultimately determined on this basis (and on the basis of additional evidence) that private stumpage prices in the province, as reflected in the New Brunswick private stumpage survey, were distorted and unusable as benchmarks.

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[31] *See* Lumber Final I&D Memo, Comment 28 (citing GNB Verification Report, Exhibit VE-1 at Table 3) (Exhibit CAN-010).

[32] Lumber Final I&D Memo, Comment 28.

[33] Lumber Final I&D Memo, Comment 28 (citing Lumber Preliminary Decision Memorandum, p. 32; Petition at Exhibit 228).

[34] Lumber Final I&D Memo, Comment 28 (citing "Analysis" section of 2008 report).

2. Ontario

27. 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.[35] 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). The primary component, however, as the USDOC "learned at verification . . . was administratively set at C$2.84/$m^3$ in FY 1997-1998 and has been inflated annually" for the two decades since.[36] More than 96 percent of the harvest volume in Ontario is subject to this pricing mechanism.

28. 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.[37] These companies attained substantial market power over sellers of non-Crown-origin standing timber by virtue of these circumstances.[38] 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,[39] served to suppress prices of private timber in the province, yielding private timber prices that were not market-determined.

3. Quebec

29. 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.[40] 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,"[41] and that 94 percent of TSG-holders did so.[42] 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

[35] *See* Lumber Preliminary Decision Memorandum, p. 30 (citing GQRGOO at Exhibit ON-STATS-2) (Exhibit CAN-008).

[36] Lumber Final I&D Memo, pp. 93-94 (Exhibit CAN-010).

[37] Lumber Preliminary Decision Memorandum, p. 30-31 (Exhibit CAN-008); Lumber Final I&D Memo, p. 94 (Exhibit CAN-010).

[38] Lumber Preliminary Decision Memorandum, p. 30-31 (Exhibit CAN-008).

[39] Lumber Preliminary Decision Memorandum, pp. 30-31 (Exhibit CAN-008); Lumber Final I&D Memo, p. 93 (Exhibit CAN-010).

[40] GQRGOQ at Table 7 (Exhibit CAN-170).

[41] Lumber Final I&D Memo, p. 99 (citing GOQ Verification Report, pp. 9, 12-13) (Exhibit CAN-010).

[42] Lumber Final I&D Memo, p. 99 (citing GOQ Verification Report, pp. 9, 12-13) (Exhibit CAN-010).

residual supply source."[43] The ramifications of this arrangement were further amplified by other aspects of the provincial timber policies. For example, the USDOC verified that TSG holders are not required to purchase all of their annual TSG allocation volumes,[44] that they did not purchase a significant percentage of the softwood sawlog volume that was put up for auction in 2015 (15 percent),[45] and that they were permitted to shift up to 10 percent of their allocated timber volumes among affiliated sawmills and to other corporations.

30. 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.[46] This reduced reliance on non-allocated sources is further evident in the data reported to the USDOC by respondents: the TSG-holding sawmills sourced just over 20 percent of their Crown supply from the auction, while the remaining nearly 80 percent they sourced from their timber supply guarantees.[47] In addition, the USDOC determined that 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.[48]

31. With respect to provincial auction prices in Quebec, the USDOC explained that it "will only use actual sales prices from competitively run government auctions," and to that end, the USDOC considered whether Quebec's auction system yielded competitive, market-determined prices.[49] In addition to the influences on auction prices that we just explained, the USDOC found that the structure of the auction system also inhibited competition. In particular, the USDOC "verified that timber purchased at the auctions must be milled within Quebec," and that this eligibility policy operates as "a substantial restriction" that "effectively excludes potential bidders that would mill timber outside of Quebec, and would exclude bidders that would want to sell timber (either harvested, or the harvested logs) for milling outside of the province."[50] The USDOC determined that "limiting bidders suppresses auction bids, because bidders understand that there are fewer parties against which their bid will compete."[51] Based on the evidence of these circumstances, 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

[43] Lumber Final I&D Memo, p. 99 (citing GOQ Verification Report, pp. 9, 12-13) (Exhibit CAN-010).

[44] Lumber Final I&D Memo, p. 101 (citing Quebec Final Market Memorandum at Table 20.2) (Exhibit CAN-010).

[45] Lumber Preliminary Decision Memorandum, p. 41 (Exhibit CAN-008); Lumber Final I&D Memo, Comment 35, pp. 101-102 (Exhibit CAN-010).

[46] Lumber Preliminary Decision Memorandum, p. 41 (Exhibit CAN-008).

[47] Lumber Final I&D Memo, pp. 99-100 (citing GOQ Primary QNR Response at Exhibit QC-STUMP-9 (Table 18); GOQ Primary QNR Response, pp. 44-45, and Exhibits QC-Stump 19 and 20; and Quebec Final Market Memorandum at Table 20.3) (Exhibit CAN-010).

[48] Lumber Preliminary Decision Memorandum, pp. 40-41 (Exhibit CAN-008); Lumber Final I&D Memo, p. 101 (citing Quebec Final Market Memorandum at Table 20.2) (Exhibit CAN-010).

[49] Lumber Final I&D Memo, pp. 105-106 (Exhibit CAN-010).

[50] Lumber Final I&D Memo, pp. 105-106 (Exhibit CAN-010).

[51] Lumber Final I&D Memo, pp. 102-103 (Exhibit CAN-010).

competitive process" that could yield market-determined benchmark prices suitable for the benchmark comparison.[52]

4. Alberta

32. Finally, 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.[53] The province provided stumpage through renewable 20-year agreements and shorter-term permits.[54] The USDOC determined that this evidence reflected "near complete Crown dominance of the market for standing timber in Alberta,"[55] 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."[56]

33. In addition, the record contained only minimal number of private stumpage transactions in Alberta that the USDOC could even consider for use as a stumpage benchmark. Alberta provided a survey of private prices for Alberta logs (the TDA survey) but this survey contained only a very small volume of private stumpage transactions (representing less than one-third of one percent of the total volume).[57] The USDOC determined that these stumpage prices were "relatively inconsequential as compared to the total volume of sales."[58] Nonetheless, the USDOC evaluated the minimal stumpage transactions and found them not to be reflective of freely determined prices between buyers and sellers, for a host of reasons.[59]

34. In sum, we have demonstrated in the U.S. first written submission (and as we have recalled briefly here today), the investigative process and analysis that the USDOC undertook for each province <u>confirms</u> 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

[52] Lumber Final I&D Memo, p. 102 (Exhibit CAN-010).

[53] *See* Lumber Preliminary Decision Memorandum, p. 5 (citing GOA – SQA Stumpage) (Exhibit CAN-008).

[54] *See* Lumber Preliminary Decision Memorandum, p. 5 (citing GOA – SQA Stumpage) (Exhibit CAN-008).

[55] Lumber Final I&D Memo, p. 51 (Exhibit CAN-010).

[56] Lumber Final I&D Memo, p. 51 (Exhibit CAN-010). The USDOC likewise noted in its preliminary determination that "where the market for a particular good or service 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. In this sense, the analysis would become circular because the benchmark price would reflect the very market distortion which the comparison is designed to detect." Lumber Preliminary Decision Memorandum, p. 28 (Exhibit CAN-008).

[57] Lumber Preliminary Decision Memorandum, p. 29 (citing GQRGOA at ABIV-50, ABIV-117 to ABIV-132 and Exhibits AB-S-41, AB-S-42, and AB-S-89 to AB-S-100) (Exhibit CAN-008).

[58] Lumber Final I&D Memo, pp. 49-50 (Exhibit CAN-010).

[59] *See* U.S. First Written Submission, paras. 324-31; Lumber Final I&D Memo, pp. 51-52 (Exhibit CAN-010); Lumber Preliminary Decision Memorandum, pp. 28-29 (Exhibit CAN-008).

additional reason – to demonstrate that the USDOC's determinations are inconsistent with Articles 1.1(b) or 14(d) of the SCM Agreement.

C. The Washington State Log Benchmark Reflects the Prevailing Market Conditions for the Good in Question in the Country of Provision

35. We turn now to Canada's claim regarding British Columbia. As explained in the U.S. first written submission, the USDOC's determination to use an out-of-country benchmark for British Columbia stumpage is justified by the USDOC's finding that provincial government predominance in the market, combined with the flaws in the British Columbia auction system, resulted in price distortions that would generate a circular comparison and, therefore, could not serve as a meaningful benchmark.

36. Moreover, 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.[60]

37. 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."[61] 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."[62] 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.[63] As these findings indicate, absent from Article 14(d) is any requirement that in-country prices must be used in all situations.[64] 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.[65]

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[60] *See* Lumber Preliminary Decision Memorandum, p. 53 (Exhibit CAN-008); Lumber Final I&D Memo, p. 71 (Exhibit CAN-010).

[61] *US – Softwood Lumber IV (AB)*, para. 96.

[62] *US – Softwood Lumber IV (AB)*, para. 96.

[63] *US – Carbon Steel (India) (AB)*, para. 4.155.

[64] *See, e.g.*, *US – Softwood Lumber IV (AB)*, para. 89 ("the use of the phrase 'in relation to' in Article 14(d) suggests that, contrary to the Panel's understanding, the drafters did not intend to exclude any possibility of using as a benchmark something other than private prices in the market of the country of provision.").

[65] *US – Carbon Steel (India) (AB)*, para. 4.188 (quoting *US – Softwood Lumber IV (AB)*, para. 93). *See US – Softwood Lumber IV (AB)*, para. 93 ("As the title indicates, Article 14 deals with the 'Calculation of the Amount of a Subsidy in Terms of the Benefit to the Recipient'. As noted above, in *Canada – Aircraft* [at para. 157], the Appellate Body stated that the 'there can be no 'benefit' to the recipient unless the 'financial contribution' makes the recipient 'better off' than it would otherwise have been, absent that contribution'. According to Article 14(d), this

38. Canada errs in describing the extent to which the use of out-of-country benchmarks is "limited" under the proper legal approach.[66] 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.[67] 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.[68] The circumstances of the underlying investigation present precisely the scenario in which reference to out-of-country benchmarks is contemplated under Article 14(d) of the SCM Agreement.[69]

39. 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.[70] 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. In reaching this conclusion, the USDOC considered a number of factors.[71] These included the government's market share, the structure of the relevant market, the types of entities operating in that market, as well as their behavior.

40. As the USDOC's market analysis demonstrates, Canada's argument that the USDOC applied a "*per se*" test based on government presence in the market is meritless. 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 ("TSLs") that artificially limited the number of bidders in British Columbia's government auctions and created other, additional

benefit is to be found when a recipient obtains goods from the government for 'less than adequate remuneration', and such adequacy is to be evaluated in relation to prevailing market conditions in the country of provision. Under the approach advocated by the Panel (that is, private prices in the country of provision must be used whenever they exist), however, there may be situations in which there is no way of telling whether the recipient is 'better off' *absent the financial contribution*.") (internal citations omitted).

[66] *See* Canada's First Written Submission, paras. 51, 54-55, and 57.

[67] *US – Softwood Lumber IV (AB)*, para. 102; *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 453; *US – Carbon Steel (India) (AB)*, para. 4.156; *US – Countervailing Measures (China) (AB)*, para. 4.51.

[68] *US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 444, 446.

[69] *US – Softwood Lumber IV (AB)*, paras. 93 and 101 (footnote omitted).

[70] Lumber Preliminary Decision Memorandum, p. 20 (citing GQRGBC at BC I-34 and Exhibit BC-S-2) (Exhibit CAN-008).

[71] *See* Lumber Final I&D Memo, pp. 55-58 (Exhibit CAN-010).

distortions; and provincial and federal log export restraints suppressed log prices, which impacted stumpage prices.[72] Canada's argument ignores each of these findings.

41. Canada also mischaracterizes the USDOC's findings as based merely on "inadequate competition."[73] In fact, the USDOC's analysis concerned British Columbia's market structure, which is consistent with the type of analysis that has been recognized as appropriate in prior panel and Appellate Body reports.[74] The USDOC's analysis appropriately focused on the common identity of the dominant firms consuming timber from auctioned tracts and timber harvested under long-term tenures because it was relevant to the consideration of whether the auction prices were competitive and open and independent. This fact had particular relevance because the government was virtually the only seller of significance in the market. The USDOC found that, under these circumstances, auction prices effectively are limited by what tenure holders pay for timber harvested from their tenures.

42. 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.[75] 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.

43. Thus, the USDOC utilized price data for delivered logs in the eastern half of the U.S. state of Washington to measure the adequacy of remuneration.[76] 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.[77] 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.[78]

44. 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

[72] *See* Lumber Final I&D Memo, pp. 55-58 (Exhibit CAN-010); *see also* U.S. First Written Submission, paras. 374-402.

[73] *See* Canada's First Written Submission, paras. 161-167.

[74] *See* Lumber Final I&D Memo, pp. 55-58 (Exhibit CAN-010); *see also* U.S. First Written Submission, paras. 374-402.

[75] *See* Lumber Final I&D Memo, pp. 55-58 (Exhibit CAN-010).

[76] *See generally* Lumber Final I&D Memo, pp. 71-75 (Exhibit CAN-010).

[77] *See* Lumber Final I&D Memo, p. 60 (Exhibit CAN-010).

[78] Lumber Final I&D Memo, pp. 71-75 (Exhibit CAN-010).

necessary adjustments to these log prices to ensure that the resulting stumpage comparison related to prevailing market conditions in British Columbia for stumpage.[79]

45. Canada argues that the USDOC's reasoning was inadequate because, according to Canada, the USDOC dismissed evidence of minor variations in the Washington data.[80] However, Canada itself agrees that Article 14(d) does not require investigating authorities to select a benchmark that is identical, but rather may relate to "the same or similar" goods, as we heard several times this morning.[81] Here, by selecting species-specific data from the same, contiguous forest area, the USDOC ensured that it identified and used similar goods to derive benchmarks that reflect the prevailing market conditions for the good in question in the country of provision. Nothing in Article 14(d) requires the USDOC to account for every conceivable difference within localities of Canada, or to account for the vast range of minutia that Canada identifies as differences.

46. For all of the foregoing reasons, Canada has failed to demonstrate that the USDOC's determination is inconsistent with Article 14(d) of the SCM Agreement. 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. And, moreover, an examination of the record demonstrates that the USDOC took into account Canada's arguments on each point regarding Washington log prices and provided an explanation for rejecting each of Canada's contentions, consistent with the information available on the record.[82] Canada invites the Panel to reweigh these considerations, but Canada has failed to demonstrate that an objective and unbiased investigating authority could not have reached the same conclusion USDOC reached on the basis of these facts.

II. CONCLUSION

47. Ultimately, Canada's position is based on a misreading of the SCM Agreement, a misunderstanding of prior panel and Appellate Body reports, and factual arguments that lack any foundation in logic. Accordingly, there is simply no basis to find that the USDOC's determination not to rely upon benchmarks derived from the provinces of British Columbia, Alberta, New Brunswick, Ontario, or Quebec government-provided stumpage is inconsistent with Article 14(d) of the SCM Agreement.

48. Madame Chairperson, members of the Panel, this concludes the first part of our opening statement. We would be pleased to respond to your questions.

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[79] *See* Lumber Final I&D Memo, pp. 73-74 (Exhibit CAN-010) (granting necessary adjustments).

[80] *See, e.g.*, Canada's First Written Submission, para. 666-671.

[81] Canada's First Written Submission, para. 264.

[82] *See* Lumber Final I&D Memo, pp. 54-78 (Exhibit CAN-010).