UNITED STATES – COUNTERVAILING DUTY MEASURES ON SOFTWOOD LUMBER FROM CANADA

(DS533)

OPENING STATEMENT OF THE UNITED STATES OF AMERICA AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL

October 16, 2019

TABLE OF REPORTS

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Canada – Renewable Energy / Canada – Feed-in Tariff Program (AB)	Appellate Body Reports, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-in Tariff Program*, WT/DS412/AB/R / WT/DS426/AB/R, adopted 24 May 2013
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 Report, *European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea*, WT/DS299/R, adopted 3 August 2005
EC – Large Civil Aircraft (Panel)	Panel Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/R, adopted 1 June 2011, as modified by Appellate Body Report, WT/DS316/AB/R
EC – Salmon (Norway) (Panel)	Panel Report, *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway*, WT/DS337/R, adopted 15 January 2008
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 – 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

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US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)	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 – Hot-Rolled Steel (AB)	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001
US – Large Civil Aircraft (Second Complaint) (AB)	Appellate Body Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/AB/R, adopted 23 March 2012
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 – Softwood Lumber VI (Article 21.5 – Canada) (AB)	Appellate Body Report, *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*, WT/DS277/AB/RW, adopted 9 May 2006
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. On behalf of the U.S. delegation, I would again like to thank the Panel, and the Secretariat staff assisting you, for your work on this dispute.

2. The United States has demonstrated that the USDOC's[1] determination in the countervailing duty investigation of softwood lumber products from Canada accords with the requirements of the SCM Agreement[2] and the GATT 1994,[3] properly interpreted pursuant to customary rules of interpretation.[4] The USDOC provided a reasoned and adequate explanation for its determination. The USDOC's 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.

3. Canada's claims must fail because they rest on flawed interpretations of the SCM Agreement and the GATT 1994; because Canada is asking the Panel to put itself in the position of the investigating authority and reweigh the massive volume of record evidence examined by the USDOC, which is not the role of panels under the DSU; and because Canada's arguments are, to a disturbing degree, premised on misrepresentation of the evidence, misreading of prior reports, and gross mischaracterization of the positions of the United States and the determinations of the USDOC.

4. Simply repeating false assertions again and again – and again this morning – does not make the assertions any less false.

5. And the falseness of Canada's assertions can be confirmed simply by looking at the USDOC's determination and the record evidence. Not that this will be an easy task for the Panel, given the massive volume of evidence on the underlying record and the sheer number of Canada's falsehoods. Yours is an unenviable task. The United States will continue to provide as much assistance as possible by carefully citing to relevant portions of the USDOC's decision memoranda where the USDOC explained its conclusions, and to the ample record evidence on which the USDOC relied.

6. In today's statement, the United States identifies and rebuts some of the most recent unsupported contentions that Canada made in its second written submission, some of which Canada repeated again this morning in its opening statement.

I. BENCHMARKS

7. The Panel is, by now, well-versed in the stumpage issues. Unfortunately, the Panel must contend with two versions of the story in this case, just to get to those real issues. One version of the story is told by the record evidence and explanations set out in the USDOC's determinations

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[1] U.S. Department of Commerce ("USDOC").

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

[3] *General Agreement on Tariffs and Trade 1994* ("GATT 1994").

[4] *See Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), Art. 3.2.

and should be the starting point for examining the issues. The other version, told by Canada, is more colorful. It departs from the words that we see on the page in the USDOC memoranda and determinations that you have before you. And, because of this divergence, the only way to know how much of the Canadian retelling reflects the record of the proceeding, is to match each characterization we have heard from Canada with the statements that the USDOC actually made in setting out its determinations.

8. The United States has endeavored throughout this dispute to put before you the words – the reasoning and the evidence – of the USDOC that comprise the determination you are called upon to examine in this dispute.[5] And it is that record and those words that should be the basis for your findings – not the imagined version of the case that Canada has been arguing against in these proceedings.

A. Mischaracterization of the Record by Canada

9. 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.[6] As you know, in the U.S. second written submission, we carried out this exercise for each of the 36 documents identified in Canada's Annex A chart of reports. We noted Canada's description of each document and explained how and where in the record the USDOC addressed the relevant issues in the preliminary decision memorandum and the final issues and decision memorandum.[7] We addressed Canada's numerous assertions that the USDOC was not sufficiently diligent in conducting its investigation, and demonstrated that Canada's argument (and its chart of reports) relies on a gross mischaracterization of how the USDOC addressed the various documents and reports that Canada has identified.[8] We demonstrated that Canada's repeated assertion that the USDOC ignored or rejected relevant information lacks any support.[9]

10. What Canada's version of the story depends on, rather, is a set of premises that are not compatible with the subsidies disciplines as set out in the SCM Agreement.

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[5] *See* Second Written Submission of the United States of America (May 6, 2019) ("U.S. Second Written Submission"), paras. 18-152.

[6] *See* U.S. Second Written Submission, para. 36.

[7] *See* U.S. Second Written Submission, para. 38; Responses of Canada to Questions to the Parties from the Panel in Connection with the First Substantive Meeting (April 3, 2019) ("Canada's Responses to the First Set of Panel Questions"), Annex A.

[8] *See* U.S. Second Written Submission, para. 18.

[9] *See* Responses of the United States to the Panel's First Set of Questions to the Parties (April 3, 2019) ("U.S. Responses to the First Set of Panel Questions"), paras. 1-8. *See also ibid.*, para. 8 (explaining that "the USDOC addressed the issues in contention, consistent with its approach to addressing all the issues raised by the parties . . . . as the United States has explained throughout the panel proceeding" and referring the Panel's attention to further detailed responses on this issue that can be found in U.S. responses to questions 25, 37, 50, 57, 75, 77, 84, 88, 98, 104, 105, and 106).

1. British Columbia

11. Concerning British Columbia, for example, Canada asserts that any "concern with respect to 'government predominance' does not, and cannot, arise in British Columbia."[10] But the British Columbia government owns more than 94 percent of the land and supplied over 90 percent of the harvest.[11] 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.[12] Yet Canada argues that "the potential for a circular price comparison does not arise in such an auction based system."[13] It is simply not credible for Canada to say that even "the potential" for circularity does not arise when it has been recognized over and over that the more predominant a government's role in the market, the more likely it is that the government's role results in the distortion of private prices.[14]

12. The USDOC of course explained that auction prices, under its benchmark regulations, may be considered in certain circumstances.[15] But the USDOC also explained that, under its hierarchy, "the Department will not use tier-one benchmark prices, such as prices from . . . government-run auctions, in instances in which it is reasonable to conclude that tier-one prices are significantly distorted as a result of the government's involvement in the market."[16] The USDOC explained that "[t]he *CVD Preamble* indicates that we will normally assume that government distortion is minimal unless the government's sale of the good accounts for a majority or, in certain circumstances, a substantial portion of the market."[17]

13. Instead of confronting the explanation that the USDOC actually provided, Canada asserts that even where the government controls over 90 percent of the supply, because British Columbia has an auction system, the "level of government 'predominance' in B.C. is therefore completely irrelevant."[18] Based on this erroneous premise, Canada argues that "market concentration . . . is likewise irrelevant" because "government predominance is irrelevant."[19]

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[10] *See* Second Written Submission of Canada (May 6, 2019) ("Canada's Second Written Submission"), para. 53.

[11] *See* U.S. Responses to the First Set of Panel Questions, para. 67.

[12] *See, e.g.*, Canada's Responses to the First Set of Panel Questions, para. 106 (discussing *US – Softwood Lumber IV (AB)*, para. 102).

[13] *See* Canada's Second Written Submission, para. 54.

[14] *See, e.g., US – Anti-Dumping and Countervailing Duties (China) (AB)*, para. 444.

[15] *See Memorandum to Ronald K. Lorentzen from Gary Taverman Subject: Decision Memorandum for the Preliminary Determination in the Countervailing Duty Investigation of Certain Softwood Lumber Products from Canada* (April 24, 2017) ("Lumber Preliminary Decision Memorandum"), pp. 26-27 (Exhibit CAN-008).

[16] *See* Lumber Preliminary Decision Memorandum, pp. 26-27 (Exhibit CAN-008).

[17] Lumber Preliminary Decision Memorandum, pp. 26-27 (citations omitted) (Exhibit CAN-008). The "*CVD Preamble*" provides descriptions of the USDOC's CVD regulations. *See* Commerce, "Countervailing Duties," 63 Fed. Reg. 65,348 (Nov. 25, 1998) ("*CVD Preamble*") (Exhibit CAN-021).

[18] *See* Canada's Second Written Submission, para. 53.

[19] *See* Canada's Second Written Submission, para. 57.

This is Canada's version of the case. These statements reflect a total disregard for the facts of the case, the applicable law, and the relevant analysis that the USDOC, together with the parties, undertook in the investigative process. As if to suggest that these were not the central issues examined in the investigation, Canada argues: "The United States continues to insist, however, that both government predominance and market concentration were relevant to Commerce's distortion analysis."[20]

14. But the relevance of government predominance and market concentration is not the result of U.S. "insistence"; rather, this is what the USDOC explained in its determination.[21] As set out in the U.S. first written submission,[22] the USDOC concluded "that the prices generated from the BCTS auctions (and, in turn, the MPS stumpage rates that are calculated using these auction prices for the remainder of the province) do not produce valid market-determined prices"[23] because the auction "prices are effectively limited by the prices that large tenure-holders paid for Crown stumpage under their own tenures."[24] Thus, the USDOC reasoned that "these prices cannot serve as benchmarks to measure the adequacy of remuneration for Crown-origin standing timber, because they do not reflect market-determined prices from competitively run government auctions."[25]

15. There are many instances like this, where Canada characterizes a finding of the USDOC as merely an invention the United States might have manufactured for the Panel. For example, with respect to whether the three-sale limit is distortive and inconsistent with an open, competitive auction, Canada says the United States "uses terms like 'straw purchases' and 'proxies' in an attempt to make these commercial arrangements sound anti-competitive."[26] But the United States was simply setting out what the USDOC actually found, and we conveyed as much in the USDOC's own words.[27]

16. As set out in the U.S. first written submission,[28] the USDOC found that "while the three-sale rule has, in practice, failed to deliver the intended policy result of broadening participation

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[20] *See* Canada's Second Written Submission, para. 58.

[21] *See* U.S. Second Written Submission, paras. 267-272; Lumber Preliminary Decision Memorandum, pp. 37-39 (Exhibit CAN-008); *Memorandum to Gary Taverman from James Maeder Subject: Countervailing Duty Investigation of Certain Softwood Lumber Products from Canada: Issues and Decision Memorandum for the Final Determination* (November 1, 2017) ("Lumber Final I&D Memo"), pp. 55-58 (Exhibit CAN-010).

[22] *See* First Written Submission of the United States of America (November 30, 2018) ("U.S. First Written Submission"), paras. 363-366.

[23] Lumber Final I&D Memo, p. 56 (Exhibit CAN-010).

[24] Lumber Preliminary Decision Memorandum, p. 39 (Exhibit CAN-008).

[25] Lumber Preliminary Decision Memorandum, p. 39 (Exhibit CAN-008).

[26] *See* Canada's Second Written Submission, para. 66 (citing U.S. Responses to the First Set of Panel Questions, paras. 264-65).

[27] *See* U.S. First Written Submission, paras. 367-368.

[28] *See* U.S. First Written Submission, paras. 367-368. *See also* U.S. Second Written Submission, paras. 272-278.

in the TSL harvest, it has, at the same time, introduced an additional source of market distortion, in the form of cutting rights fees necessitated by 'straw purchases' or proxy bidding."[29] The USDOC explained in the final determination that the three-sale limit was independently sufficient to find that winning BCTS auction bids were not market-determined.[30] Addressing the three-sale limit, the USDOC explained that, "[f]or this reason alone, the auctions could not provide a tier-one benchmark under our regulations even if we were to find a non-distorted market overall such that the first tier in our methodology would apply."[31]

17. The USDOC acknowledged the limit was created "ostensibly to encourage competition by imposing a cap on the extent of participation by any one company and thus preventing the large companies from dominating all the auctions," but found that "by so doing, the GBC imposes an artificial barrier to participation in the BCTS auctions."[32] The USDOC found, specifically, that "record information indicates that the three-sale limit has failed to significantly diversify the entities harvesting from TSLs won on the auction in the manner intended," because "dominant firms have managed to get around the three-sale rule by making 'straw purchases' through proxy bidders, thus maintaining effective dominance in these auctions."[33]

18. Canada's portrayal of the determination, however, seeks to give the impression that these issues were never addressed or that the USDOC did not provide this kind of detailed explanation and analysis. The record simply does not support Canada's portrayal.

19. And this is the case with the other provinces as well.

2. Alberta

20. Concerning Alberta, Canada mischaracterizes the record and the USDOC's analysis regarding salvage logs and the Alberta export ban, but we have addressed those issues extensively and simply direct the Panel to those arguments.[34]

3. Ontario

21. Concerning Ontario, Canada mischaracterizes the record as containing no assessment of distortion within Ontario.[35] Canada also mischaracterizes the USDOC's assessment of the Hendricks report, arguing that "the United States and Commerce ignored Dr. Hendricks'

[29] Lumber Final I&D Memo, p. 57 (Exhibit CAN-010).

[30] Lumber Final I&D Memo, p. 57 (Exhibit CAN-010).

[31] Lumber Final I&D Memo, p. 57 (Exhibit CAN-010).

[32] Lumber Final I&D Memo, p. 57 (Exhibit CAN-010).

[33] Lumber Final I&D Memo, p. 57 (Exhibit CAN-010).

[34] *See* U.S. Second Written Submission, paras. 249-253; U.S. First Written Submission, paras. 315-343. *See also* Lumber Final I&D Memo, pp. 49-54 (Exhibit CAN-010); Lumber Preliminary Decision Memorandum, pp. 28-29 (Exhibit CAN-008).

[35] *See* Canada's Second Written Submission, paras. 107-110.

findings."[36] But neither of Canada's assertions is correct. And for the sake of advancing the discussion, we will refer the Panel to our submissions addressing these mischaracterizations.[37]

4. Quebec

22. Concerning Quebec, Canada has continued to argue that the USDOC based its determination on the fact that auction prices track TSG prices instead of finding that TSG prices track auction prices.[38] But Canada's argument is not based on data; it is based on spin. Canada's argument relies on mischaracterizing the premise of the USDOC's analysis as depending on prices being identical to show that auction bids are "limited to" TSG prices. But, as we have demonstrated in our submissions, the USDOC never relied on that erroneous premise.[39] Rather, 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.[40] All of Canada's arguments rely on mischaracterizing this observation, as if the USDOC had instead relied on some other basis. But this was the core of the USDOC's findings; not the series of strawman arguments that Canada sets up and knocks down. The USDOC ultimately concluded on this basis 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.[41] Canada's emphasis on other tangential or irrelevant features is simply Canada's way of obfuscating the real basis for the USDOC's finding. The United States has addressed these issues and will not repeat our positions here in this statement.[42]

5. New Brunswick

23. For New Brunswick, Canada asserts without support that the USDOC ignored market characteristics of New Brunswick.[43] But the USDOC specifically addressed these issues in its

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[36] *See* Canada's Second Written Submission, paras. 112-123.

[37] *See* U.S. Second Written Submission, paras. 254-256; U.S. First Written Submission, paras. 279-314.

[38] *See* Canada's Second Written Submission, para. 128.

[39] *See*, *e.g.*, U.S. Responses to the First Set of Panel Questions, paras. 155-161.

[40] *See* U.S. Responses to the First Set of Panel Questions, para. 155; U.S. First Written Submission, para. 261 (citing Lumber Final I&D Memo, pp. 105-106 (Exhibit CAN-010)).

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

[42] *See* U.S. Responses to the First Set of Panel Questions, paras. 155-161, 185-190 (U.S. responses to questions 49, 50, 52, 53, 54, 55, and 60); U.S. Second Written Submission, paras. 257-260. Canada's arguments regarding the Marshall data dump and the provincial export restraints have likewise been addressed in prior submissions. *See* Canada's Second Written Submission, paras. 141-145; *cf.* U.S. Responses to the First Set of Panel Questions, paras. 183 and 190; U.S. Second Written Submission, paras. 89-91. *See also* Canada's Second Written Submission, paras. 146-151; *cf.* U.S. Second Written Submission, paras. 196-199.

[43] *See* Canada's Second Written Submission, paras. 162-172.

determinations and did so at length, as we have noted.[44] And, as we know, Canada never misses a chance to mischaracterize and even to disavow the relevant findings of the Auditor General Reports and the report of the Private Forest Task Force, with Canada asserting that these reports indicate that nothing has changed since 2006 in New Brunswick and that the USDOC had reached the opposite conclusion only because it "selectively quoted" the report, relying on a "selective reading of a single piece of evidence."[45] In reality, the USDOC quoted extensively from the report to insure against this kind of tactic and, at the last panel meeting, we even urged the Panel to read the full report because it is all the more evident from a full reading that the report supports the USDOC's finding.[46] The part of the report that Canada omits directly contradicts the assertions Canada made in its second written submission.[47]

24. Canada also points to an error in the "overhang" calculation, but it is one that does not alter the analysis, and yet Canada describes that error in hyperbolic terms.[48] But these numbers convey no real information about anything and Canada's portrayal of this error is not a fair characterization of the USDOC's analysis.[49] Instead of looking at the material questions, Canada prefers to play games with the numbers to give them false importance and then relies on the sheer volume of paper submitted in this dispute to shield it from scrutiny. Canada also misrepresents what the implications of that error would be. Contrary to Canada's argument, it is the existence (and not the extent) of the "overhang" that matters. The existence of "overhang" is a categorical question, not one of degree.

6. Nova Scotia

25. Canada also mischaracterizes the verification process that was conducted in Nova Scotia and other provinces.[50] For example, Canada continues to mischaracterize the spot-checks conducted in the Nova Scotia Verification Report and the alleged errors observed through that process.[51] And Canada has continued to argue that minor corrections identified at verification were much more problematic than they actually are.[52] Canada asserts that certain of the transactions that the USDOC examined at verification "exhibited cause for concern," but Canada's citation for this allegation refers only to Canada's own case brief, wherein Canada

[44] *See* U.S. First Written Submission, paras. 218-223; U.S. Responses to the First Set of Panel Questions, paras. 209-218.

[45] *See* Canada's Second Written Submission, paras. 173-176.

[46] *See* U.S. Responses to the First Set of Panel Questions, paras. 200-206.

[47] *See* U.S. First Written Submission, paras. 182-237; U.S. Second Written Submission, para. 262.

[48] *See* Canada's Second Written Submission, paras. 154-161.

[49] *See* U.S. Responses to the First Set of Panel Questions, paras. 219 and 224.

[50] *See, e.g.*, Canada's Second Written Submission, paras. 262-267.

[51] *See* Canada's Second Written Submission, paras. 262 and 266.

[52] *See* Canada's Responses to the First Set of Panel Questions, paras. 133-134.

repeats the same unsupported assertion.[53] The USDOC took this into account, as we have explained.[54]

26. In this and in countless other of these examples, what Canada has done, as a matter of technique, is really to avoid confronting the language of the USDOC's findings and the reasons contained therein. If Canada had been willing to engage with the USDOC's reasoning and explanations, the result would look like the response that we provided to refute Canada's Annex A chart, as set out in paragraphs 38-152 of the U.S. second written submission. Whereas Canada's Annex A chart purports to categorize every exhibit as dismissed or ignored, or some other variation, the U.S. response to Canada's chart shows how the USDOC took on the issues raised, with respect to each of the 36 documents that Canada has asked the USDOC and the Panel to consider.

B. The USDOC Preferred Independent and Reliable Benchmarks

27. The weakness of Canada's arguments is most evident with respect to the benchmark price adjustments that Canada and the Canadian parties demanded from the USDOC, when there is no basis in law or evidence to support those demands.

1. The BC Adjustments and BC Benchmark

28. With respect to the BC adjustments, for example, Canada has not been able to show in its submissions to the Panel that the omission of a valid site-selection methodology in the Dual-Scale Study can or should have been overlooked by the USDOC in its assessment of the evidence.[55] Canada has adopted and then abandoned three different approaches to excuse this material defect in the study, but none of these approaches resolves the question of site selection bias noted by the USDOC.[56] Moreover, each one of these three approaches contradicts the other two. It undermines the work of the Panel for Canada to present contradictory approaches and not identify which is the basis for its argument.

29. In the first instance, Canada originally argued that it was not an issue that was raised in the investigation.[57] In particular, Canada said, in its first written submission, that the method of choosing scaling sites was irrelevant because elsewhere in the study there were references to

[53] *See* Oral Statement of Canada at the First Substantive Meeting of the Panel, Day 3 (February 28, 2019) (Confidential Version) ("Canada's First Opening Statement (Day 3)"), para. 122 and footnote 79 (citing GOC Joint Case Brief, p. 62 and footnote 146 (Exhibit CAN-513)).

[54] *See* U.S. Second Written Submission, paras. 184-186.

[55] *See, e.g.*, Canada's Second Written Submission, para. 184.

[56] *See* First Written Submission of Canada (October 5, 2018) ("Canada's First Written Submission"), paras. 681-682; Canada's Responses to the First Set of Panel Questions, paras. 278-279; Canada's Second Written Submission, paras. 185, 188, and 193.

[57] *See* Canada's First Written Submission, paras. 681-682.

employing stratified random sampling in other aspects of its data collection or analysis.[58] Therefore, according to Canada's first explanation, the study "contained" a statistically valid method – just not the relevant one, i.e., the one whose absence called into question how exactly were the sites selected to ensure against selection bias.[59]

30. Canada next argued, in its responses to the first set of Panel questions, that its methodology could retroactively become a valid site selection methodology by applying a post-hoc label, that is: "purposive sampling" – "a type of non-probability sampling technique."[60] This post-investigation step is, of course, a case of too little, too late, particularly where that label essentially defined the methodology as one based on personal preferences (which did not resolve the concern over potential bias).[61]

31. And finally, in its second written submission, Canada has argued that the USDOC's concern refers to whether the study was "representative" and thus should be resolved if the number of observations constitutes some acceptable portion of the total population.[62] But the USDOC's reference to whether the study was "representative" was made in relation to whether there was bias in the selection of the sites, not whether the number of sites sampled was a sufficiently large portion of the total population. Thus, Canada mischaracterizes the USDOC's reasoning when it says things like "given [the USDOC's] underlying concerns on the representativeness"[63] or "Commerce dismissed [the study] . . . based on its supposed inability to assess the representativeness."[64] The USDOC was not concerned with the representativeness as Canada describes it. The USDOC simply wanted to be able to assure itself that some minimal controls against potential bias (or the appearance of it) were built into the study's design. And Canada has never been able to provide that kind of assurance.

32. In many ways, Canada's willingness to defend this self-commissioned study reveals the double standard that Canada wants to apply to the kinds of reports that Canada wants to validate and the ones that Canada wants to dismiss.[65] Even now, Canada has not responded to the point made in the U.S. responses to the first set of Panel questions that not all reports will have the same potential for bias.[66] For example, a report may be commissioned to perform an audit, or to conduct empirical research, or for the collection of information in the ordinary course of business. Unlike reports commissioned for the purpose of obtaining a favorable outcome in an adversarial context, these other kinds of reports do not favor one side or the other, and the

[58] *See* Canada's First Written Submission, paras. 681-682.

[59] *See* Canada's First Written Submission, paras. 681-682.

[60] *See* Canada's Responses to the First Set of Panel Questions, paras. 278-279 and footnote 368.

[61] *See* Canada's Responses to the First Set of Panel Questions, paras. 278-279 and footnote 368.

[62] *See* Canada's Second Written Submission, paras. 185, 188, and 193.

[63] *See* Canada's Second Written Submission, para. 180.

[64] *See* Canada's Second Written Submission, para. 193.

[65] *See* U.S. Responses to the First Set of Panel Questions, paras. 4-6.

[66] *See* U.S. Responses to the First Set of Panel Questions, para. 5.

authors of those kinds of reports have no interest in the outcome of a particular adversarial proceeding. But compare this to Canada's treatment of the Auditor's report: Canada rejects the conclusions of an independent audit and instead embraces the reports that Canada has put together for this proceeding.

33. And it is indeed the independent reports on the record of this investigation to which Canada most strenuously objects – but, as Canada must see, the value of an audit is precisely the fact that the auditor may report observations that are unfavorable to the party who commissioned the audit. This is why, for example, the USDOC was able to rely on the Spelter study in deriving the BC benchmark – the value of the Spelter research is precisely that it was conducted independent of this proceeding and any parties who might have had an interest in the outcome.

2. The Nova Scotia Benchmark

34. Likewise, with respect to the Nova Scotia Survey, which was conducted by Deloitte (another independent auditor), Canada argues that that survey should be rejected because it was commissioned by Nova Scotia – but, again, an important part of the value of that survey is that it was commissioned for an independent purpose, entirely unrelated to this proceeding. Thus, the USDOC could be confident that it was relying on a study that, although commissioned by Nova Scotia, had been commissioned at arm's length in the ordinary course of business. Canada's arguments are deficient in this regard because they fail to take into account the superior value of an independent finding over a finding commissioned by an adversarial party in the course of litigation.

35. Again and again in this dispute we have seen that Canada values the evidence that it has commissioned over evidence that is necessarily independent of the proceeding. And Canada has been clear about the kind of evidence it thinks is more valid – that is, one-sided evidence that cannot be independently tested and does not have stand-alone value outside of this proceeding.

C. Conclusion

36. In the end, Canada seeks to raise doubts about the USDOC's findings, but it fails to show that the determination was inadequate or that the USDOC reached conclusions that an objective and unbiased investigating authority could not have reached.

37. Canada's legal arguments are similarly unavailing. The USDOC used in-country benchmarks for stumpage that is the same as (or similar to) the stumpage provided by the government to Canadian lumber producers in Alberta, Ontario, New Brunswick, and Quebec.[67] This is the approach contemplated by Article 14(d) of the SCM Agreement. The USDOC's use of an out-of-country benchmark for British Columbia likewise represents a suitable basis for comparison, and the recourse to the out-of-country prices for BC was warranted by virtue of the overwhelming government predominance of BC as the owner of more than 94 percent of all the

[67] *See* U.S. First Written Submission, para. 65.

land and as the supplier of more than 90 percent of the harvested timber.[68] This is the exact scenario where the Appellate Body reasoned that out-of-country benchmarks were appropriate in *US – Softwood Lumber IV*.[69] Here, the USDOC executed its investigation in precisely the manner contemplated by the relevant provisions of the SCM Agreement, including Articles 1.1(b) and 14(d).[70]

38. Moreover, when viewed under the applicable standard of review in this dispute, *i.e.*, whether an unbiased and objective investigating authority could have (as distinct from would have) reached the same conclusions based on the evidence and arguments before it, the conclusion is yes – based on a review of the record of the investigation and the explanations and reasons given by the USDOC for its determinations – the USDOC has met that standard here.[71]

II. OFFSETS

39. The United States has demonstrated that nothing in the covered agreements requires that an investigating authority provide offsets for negative comparison results when aggregating multiple comparison results to calculate the overall amount of the subsidy benefit.[72] Put simply, Canada and its provinces get no credit for not subsidizing some transactions when they did subsidize other transactions.

40. Canada's claim – and it is important to recall Canada's precise claim here – is that the United States "improperly set to zero the results of comparisons that did not show a benefit before it calculated the aggregate benefit from the provision of stumpage".[73] This claim utterly lacks merit, as the United States has shown.

41. In its second written submission, Canada persists in focusing its arguments concerning this claim on an alleged "mismatch" between transactions and benchmarks.[74] In this, Canada simply repeats arguments that it has made previously, to which the United States has already responded.[75]

42. To reiterate, though, the question of how to select and match transactions and benchmarks is entirely separate from the issue of the aggregation of multiple comparison results

[68] *See* U.S. First Written Submission, paras. 66 and 353.

[69] *US – Softwood Lumber IV (AB)*, para. 102.

[70] *See* U.S. First Written Submission, paras. 56-68.

[71] *See* U.S. First Written Submission, paras. 43-44.

[72] *See* U.S. First Written Submission, paras. 472-527; Opening Statement of the United States of America on the Third Day of the First Substantive Meeting of the Panel (February 28, 2019) ("U.S. First Opening Statement (Day 3)"), paras. 10-17; U.S. Responses to the First Set of Panel Questions, paras. 344-348; U.S. Second Written Submission, paras. 302-332.

[73] Panel Request, p. 2, part A.4.

[74] *See* Canada's Second Written Submission, paras. 283-307.

[75] *See, e.g.*, U.S. Second Written Submission, paras. 310-326.

and the provision of offsets for negative comparison results in the overall subsidy benefit calculation. In its own panel request, Canada identified separate and independent claims in different sections of the request. Certain claims relate to matching transactions and benchmarks for the purpose of comparing them.[76] Canada separately described another claim alleging that the United States "set to zero the results of comparisons that did not show a benefit".[77] That claim has nothing to do with matching transactions and benchmarks for the purpose of comparing them.

43. Canada's first written submission likewise presents Canada's arguments concerning these separate claims in separate sections of the submission.[78] And in the U.S. first written submission, the United States separately responded to Canada's claims and arguments on the same basis on which Canada presented them.[79]

44. It makes sense that Canada would separately identify and address these claims, because the issue of the alleged "mismatch" of transactions and benchmarks has nothing to do with the later aggregation of comparison results to determine the overall amount of the benefit of subsidies that have been found to exist. It makes no sense at all that Canada would attempt to repurpose the same arguments concerning the issue of the alleged "mismatch" of transactions and benchmarks as support for its claim concerning the aggregation of comparison results.

45. Canada suggests that its "position is based on the requirement in Article 14(d) that the benefit calculation methodology must account for prevailing market conditions for the good provided."[80] Without question, the issue of matching transactions and benchmarks implicates the obligation in Article 14(d) to account for prevailing market conditions in the country of provision. However, the later step in the process of aggregating comparison results – after transactions and benchmarks have been identified and compared – has nothing to do with accounting for prevailing market conditions.

46. If the transactions and benchmarks are 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

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[76] *See* Panel Request, p. 2, parts A.1 and A.2.

[77] Panel Request, p. 2, part A.4.

[78] *See* Canada's First Written Submission, paras. 488-598 (addressing Canada's claims against the USDOC's rejection of prices in New Brunswick and use of Nova Scotia prices as benchmarks); paras. 61-227 and 601-740 (addressing Canada's claims against the USDOC's rejection of prices in British Columbia and use of a Washington state benchmark); paras. 721-731 (addressing "stand-as-a-whole" pricing in British Columbia); and paras. 919-942 (addressing Canada's claim that the USDOC "improperly 'set to zero'" the results of certain comparisons used to calculate the benefit).

[79] *See* U.S. First Written Submission, paras. 182-237 (New Brunswick benchmark); paras. 344-471 (British Columbia benchmark); paras. 459-465 ("stand-as-a-whole" pricing in British Columbia); and paras. 472-527 ("setting to zero" certain comparison results).

[80] Canada's Second Written Submission, para. 291.

aggregation and averaging and offsetting certainly would not result in the "careful matching" that Canada insists is required.[81]

47. And if the transactions and benchmarks were matched correctly, then certainly it would not be appropriate to provide offsets across different subsidies. Canada itself even appears to have agreed with this proposition in response to a question from the Panel.[82]

48. Finally, as the United States has demonstrated[83] – and Canada simply has never seriously responded to the interpretive arguments that the United States has made – nothing in the text of the provisions of the covered agreements under which Canada has made its claims requires the kind of aggregation and offsetting across different subsidies for which Canada contends. And that is precisely what the panel found in *US – Anti-Dumping and Countervailing Duties (China)*,[84] despite Canada's stubborn misreading of that report.[85] The Panel here should view the reasoning in that report as persuasive and take it into account as you consider Canada's claim.

49. In sum, Canada's proposed solution to a purported problem is to impose on Members an obligation to which they never agreed – something strictly prohibited by Articles 3.2 and 19.2 of the DSU (to which Members actually did agree) – but Canada's proposed solution would not even fix the purported problem. Canada's claim is utterly meritless and should be rejected.

III. LOG EXPORT RESTRAINTS

50. The United States has demonstrated that there is no merit to Canada's claims that the USDOC improperly investigated and countervailed British Columbia's and Canada's log export restraints.[86] In response to the Panel's questions, the United States has provided references to the extensive record evidence that supports the USDOC's determinations, and the United States has provided excerpts of and citations to the USDOC's well-reasoned and fully-documented explanations of its determinations.[87] In the U.S. second written submission, the United States carefully responded to the many misstatements, misrepresentations, and mischaracterizations Canada has made throughout this dispute concerning Canada's log export restraints claim.[88]

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[81] *See, e.g.*, Canada's Second Written Submission, paras. 284, 286, 291, 296.

[82] *See* Canada's Responses to the First Set of Panel Questions, para. 314.

[83] *See* U.S. First Written Submission, paras. 474-515; U.S. Second Written Submission, paras. 327-331.

[84] *See US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 11.59.

[85] *See* U.S. Second Written Submission, paras. 310-315; U.S. First Written Submission, paras. 476-483.

[86] *See* U.S. First Written Submission, paras. 528-611; Opening Statement of the United States of America on the Second Day of the First Substantive Meeting of the Panel (February 27, 2019) ("U.S. First Opening Statement (Day 2)"), paras. 26-35; U.S. Responses to the First Set of Panel Questions, paras. 355-401; U.S. Second Written Submission, paras. 333-404.

[87] *See* U.S. Responses to the First Set of Panel Questions, paras. 355-401.

[88] *See* U.S. Second Written Submission, paras. 333-404.

51. Canada, on the other hand, just continues to repeat assertions that the United States has already demonstrated are false. The U.S. second written submission goes through many of Canada's false assertions one by one, but Canada made a number of the same false assertions again in its second written submission, and again this morning in its opening statement. So, we are obliged today to briefly touch on them once more.

52. Canada continues to assert that the USDOC took an effects-based approach to its analysis of British Columbia's log export restraints.[89] That is false, as the United States has demonstrated.[90] It was Canadian interested parties that 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.

53. Canada continues to assert that the United States ignores relevant prior panel and Appellate Body reports.[91] That is false, as the United States has demonstrated.[92] The United States has discussed relevant prior reports at length and explained how Canada misreads those reports and why Canada's reliance on those reports is misplaced. Canada simply has ignored the U.S. arguments and has not responded to them.

54. Canada continues to assert that the United States is attempting to "re-shift the focus" of the USDOC's determination.[93] That is false, as the United States has demonstrated.[94] 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. As explained in the U.S. second written submission, it is Canada that is attempting to distort the focus of the USDOC's analysis and mislead the Panel concerning what the USDOC found, and the bases that the USDOC articulated for its determination.

55. Canada continues to assert that U.S. arguments "ignore the actual operation of the LEP process".[95] That is false, as the United States has demonstrated. The United States and the USDOC have directly addressed Canada's observation that 99.5 percent of export applications were approved, and explained why the USDOC nevertheless concluded that this does not demonstrate that exports were not restrained.[96] Contrary to Canada's false assertion, the

[89] *See, e.g.*, Canada's Second Written Submission, paras. 310, 320-327.

[90] *See, e.g.*, U.S. Second Written Submission, paras. 334-347.

[91] *See, e.g.*, Canada's Second Written Submission, section III.A.

[92] *See, e.g.*, U.S. Second Written Submission, paras. 351-355.

[93] *See, e.g.*, Canada's Second Written Submission, para. 318.

[94] *See, e.g.*, U.S. Second Written Submission, paras. 336-347.

[95] *See, e.g.*, Canada's Second Written Submission, section III.B.2(a), paras. 320-327.

[96] *See, e.g.*, U.S. Second Written Submission, paras. 366-368.

USDOC's conclusions concerning "blocking" are not "speculative"[97] and they are not "allegations".[98] The U.S. responses to the first set of Panel questions go through the evidence of the "blocking" system that was on the USDOC's administrative record, including articles and reports prepared independently of the USDOC's countervailing duty investigation, as well as evidence from a log supplier who has experienced "blocking".[99] The U.S. second written submission likewise responds directly to Canada's highlighting of affidavits from two British Columbia log suppliers who describe their experiences exporting logs.[100] It is self-evident that the mere existence of two log suppliers that have not personally experienced "blocking" does not demonstrate that the "blocking" practice does not exist. Here, Canada again is asking the Panel to put itself in the position of the investigating authority and reweigh the evidence. That is not the role of panels under the DSU.

56. Canada asserts that the United States "ignores the specific and detailed information" concerning the length of the surplus process.[101] That is false, as the United States has demonstrated.[102] An independently prepared report by the Fraser Institute explained that "the log export approval process takes around seven weeks if no domestic offer is received, but takes nine to 13 weeks if domestic offers are received."[103] Hence, the USDOC found, and the United States has argued, that it "can take between seven and thirteen weeks"[104] to obtain an export permit.[105] The United States has not asserted that the process always takes that long. Canada has confused matters by conflating separate processes in its discussion of the length of the surplus process, but nothing Canada has asserted contradicts what the United States has argued or what the USDOC found.[106]

57. Canada asserts that "the record evidence does not support Commerce's intermediate factual finding that the fee-in-lieu constitutes a 'meaningful obstacle to log export activity'."[107] That assertion is false. The USDOC did not find that the fee-in-lieu constitutes a "meaningful obstacle to log export activity". The language Canada quotes actually is from the USDOC's description of the argument made by the Government of Canada and the Government of British

[97] Canada's Second Written Submission, para. 323.

[98] Canada's Second Written Submission, para. 324.

[99] *See* U.S. Responses to the First Set of Panel Questions, paras. 245-249 and 390-396.

[100] *See* U.S. Second Written Submission, para. 368.

[101] Canada's Second Written Submission, para. 329.

[102] *See* U.S. Second Written Submission, paras. 363-365.

[103] *See* Joel Wood, "Log Export Policy for British Columbia," Fraser Institute (June 2014), p. 10 (Exhibit 244 of the petition) (p. 26 of the PDF version of Exhibit USA-010).

[104] Lumber Preliminary Decision Memorandum, p. 59 (Exhibit CAN-008) (underline added).

[105] *See* U.S. Responses to the First Set of Panel Questions, paras. 361-366.

[106] *See* U.S. Second Written Submission, para. 364.

[107] Canada's Second Written Submission, para. 333.

Columbia.[108] The USDOC explained that it "disagree[d] with respondents' assertions" regarding the fee-in-lieu and set forth the reasons for that disagreement.[109] The USDOC specifically addressed – and did not ignore – the percentage of exports that come from provincial lands versus federal lands, as well as the specific amount of the fees. The USDOC found, based on its examination of the evidence, that the "fees can be significant, and can substantially increase the final price a potential customer would have to pay for the logs", and the USDOC further found that "the fact that any fee is required at all [is] significant."[110]

58. Canada also mischaracterizes the USDOC's response to Canada's assertion that "the LEP process is largely irrelevant for the respondent companies with operations in British Columbia because these companies operate only in the Interior – away from the areas from which it is economically feasible to transport logs for export from Canada."[111] Canada incorrectly suggests that the USDOC referenced only the purportedly effects-based "ripple theory" in explaining that log export restraints affect British Columbia's interior.[112] However, the USDOC also explained that the laws and regulations governing log exports from British Columbia applied throughout the entire province, including the interior where the respondents are located.[113] And the USDOC cited record evidence demonstrating that logs can be and are, in fact, exported from the interior of British Columbia to the United States.[114]

59. Finally, Canada questions the USDOC's discussion of the federal *Export and Import Permits Act* ("EIPA"),[115] which imposes legal penalties for exporting logs without authorization, including through severe fines and jail time. The U.S. second written submission responds to Canada's arguments and demonstrates that they lack merit.[116] The Appellate Body has explained that, "[i]n most cases, one would expect entrustment or direction of a private body to involve some form of threat or inducement, which could, in turn, serve as evidence of entrustment or direction."[117] The federal legal penalty for exporting logs without authorization is a "form of threat or inducement" by the government for private log suppliers in British Columbia to comply with the law requiring that they supply logs to consumers in British Columbia, unless granted an exemption and export authorization. Under provincial and federal law, a log supplier in British Columbia must sell its logs – or at least attempt to sell its logs – to consumers in British Columbia. The application process for a surplus exemption explicitly requires that a log supplier

[108] *See* Lumber Final I&D Memo, p. 141 (Exhibit CAN-010).

[109] *See* Lumber Final I&D Memo, p. 142 (Exhibit CAN-010).

[110] Lumber Final I&D Memo, p. 142 (Exhibit CAN-010).

[111] *See* Canada's Second Written Submission, para. 321.

[112] *See* Canada's Second Written Submission, para. 321.

[113] *See* Lumber Final I&D Memo, pp. 144-145 (Exhibit CAN-010).

[114] *See* Lumber Final I&D Memo, pp. 144-147 (Exhibit CAN-010).

[115] *See* Canada's Second Written Submission, para. 334.

[116] *See, e.g.*, U.S. Second Written Submission, paras. 346, 371.

[117] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 116.

attempt to sell its logs to consumers in British Columbia before an exemption can be approved and a federal export permit issued. If a log supplier fails to follow the procedure and exports logs without a federal export permit, the log supplier would face a serious legal penalty. The legal penalty is precisely the kind of "threat or inducement" evidencing "entrustment or direction" to which the Appellate Body was referring,[118] and that evidence supports the USDOC's conclusion.

60. Ultimately, the USDOC found that the Government of British Columbia and the Government of Canada, through official government action, entrusted or directed British Columbia log suppliers to provide a good – logs – to British Columbia consumers, including mill operators. A review of the USDOC's decision memoranda shows that the USDOC's explanation of its determination is "reasoned and adequate,"[119] the USDOC's determination, which is based on the totality of information on the administrative record,[120] 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.[121]

61. And that is the question before the Panel: whether an unbiased and objective investigating authority could have made the same finding that the USDOC made – not whether every other investigating authority would have made the same finding, or even whether the Panel itself would have made the same finding. Canada asks the Panel to put itself in the position of the USDOC and reweigh the evidence. But, again, that is not the role of panels under the DSU, and Canada's claims therefore must fail.

IV. SILVICULTURE AND FOREST MANAGEMENT

62. The United States has demonstrated that there is no merit to Canada's claims with respect to the grants provided by New Brunswick and Quebec for silviculture and forest management.[122]

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[118] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 116.

[119] *US – Softwood Lumber VI (Article 21.5 – Canada) (AB)*, para. 97 (quoting *US – Hot-Rolled Steel (AB)*, para. 193).

[120] *See, e.g.*, Lumber Preliminary Decision Memorandum, p. 60 ("Based on the record evidence, we preliminarily find that the BC log export restraints result in a financial contribution by means of entrustment or direction of private entities…, in that official governmental action compels suppliers of BC logs to supply to BC consumers, including mill operators." (underline added)) (Exhibit CAN-008); Lumber Final I&D Memo, pp. 139 (noting its consideration of record information in its "totality"), 145 ("record evidence supports our preliminary determination") (Exhibit CAN-010).

[121] *See, e.g., US – Countervailing Measures on Certain EC Products (Article 21.5 – EC) (Panel)*, 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.

[122] *See* U.S. Second Written Submission, paras. 409-425.

63. Canada's latest arguments pertaining to this issue are that JDIL "was free to not contract with the Crown to provide license management and silviculture services"[123] and "Resolute was free to choose not to harvest blocks subject to partial cuts."[124] These arguments also lack merit.

64. JDIL and Resolute paid the provincial governments so they could harvest trees from certain Crown lands. If these companies wanted to profit from this opportunity, they had to abide by, and assume the costs attendant with, the applicable laws for doing so, including the laws regarding the performance of silviculture.[125]

65. It is therefore misleading for Canada to suggest that JDIL and Resolute are free to choose not to harvest timber from the lands in question, because such a choice necessitates that JDIL forfeit its ability to harvest and profit from the Crown lands described in its license and Resolute forfeit its ability to harvest and profit from the blocks subject to the required use of partial cutting techniques.

66. JDIL and Resolute both chose to harvest trees from the Crown lands in question. Both JDIL and Resolute thus 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.[126]

67. The USDOC's conclusions that these payments constituted grants under Article 1.1(a)(1)(i) of the SCM Agreement, or conferred a benefit on the recipients in the amount of the grants under Article 1.1(b) or Article 14 of the SCM Agreement, are conclusions an unbiased and objective investigating authority could have reached in light of the facts and arguments before it.

V. ELECTRICITY – BENEFIT

68. The United States has demonstrated that there is no merit to Canada's claims with respect to the benefits conferred by certain provincial electricity subsidies.

A. BC Hydro's and Hydro-Quebec's Purchases of Electricity

69. Canada argues that the United States introduced *ex post* rationalizations regarding the benefit to producers of electricity purchased by BC Hydro and Hydro-Quebec.[127] That is not the case. The United States stands by the findings and determinations made by the USDOC, all of

[123] Canada's Second Written Submission, para. 340.

[124] Canada's Second Written Submission, para. 340.

[125] *See* U.S. Second Written Submission, paras. 419-420.

[126] *See* U.S. First Written Submission, paras. 636-648.

[127] *See* Canada's Second Written Submission, para. 354.

which were based on record evidence.[128] Here, the United States was simply responding to questions from the Panel about arguments that Canada had made in its first written submission,[129] arguments that Canadian respondents had not made during the underlying countervailing duty investigation.

70. Further, the U.S. responses to Canada's arguments are strictly based on the evidence before the USDOC at the time it made its determination and do not introduce new evidence. It is indisputable that a Member may defend its determination on the basis of evidence contained in the record at the time of a determination, even if an investigating authority did not specifically reference or discuss such evidence in its determination.[130]

71. Our responses are also based on evidence that demonstrates that 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.

72. Specifically, Canada's argument ignores that the Appellate Body's reasoning in *Canada – Renewable Energy* relies, in part, on efforts by a government to intervene in an energy marketplace to reduce reliance on fossil energy resources.[131] Canada's argument also ignores that 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."[132]

73. The U.S. responses to Canada's arguments clearly showed that 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

[128] *See* U.S. First Written Submission, paras. 674-679, 683 (BC Hydro) and paras. 687-691, 694 (Hydro Quebec).

[129] *See* U.S. Responses to the First Set of Panel Questions, responses to questions 136 and 137.

[130] *See US – Countervailing Duty Investigation on DRAMS (AB)*, para. 161; *EC – Salmon (Norway) (Panel)*, paras. 7.837-7.839.

[131] *See Canada – Renewable Energy / Canada – Feed-in Tariff Program (AB)*, para. 5.186.

[132] *Canada – Renewable Energy / Canada – Feed-in Tariff Program (AB)*, para. 5.188.

- British Columbia and Quebec did not intervene through subsidy programs to reduce reliance on fossil energy resources, but intervened generally to support existing players in the well-established renewable energy market.[133]

74. Our responses further demonstrated that the evidence before the USDOC did not show that British Columbia and Quebec intervened through subsidy programs to create uniquely biomass-based electricity markets.[134]

75. In sum, Canada's contention that the United States is offering *ex post* rationalizations is baseless. The USDOC's findings and determinations are firmly grounded in the record evidence, and the U.S. responses to Canada's arguments clearly show that there was no basis in the evidence before the USDOC at the time of its determination to even suggest that British Columbia and Quebec intervened to create new markets that otherwise would not exist.[135]

76. The USDOC's determinations that BC Hydro's purchase of electricity conferred a benefit on Tolko and West Fraser, and Hydro-Quebec's purchase of electricity conferred a benefit on Resolute, are determinations that an unbiased and objective investigating authority could have reached in light of the facts and arguments before it. None of Canada's arguments show that the USDOC's determinations were inconsistent with Articles 1.1(b) and 14(d) of the SCM Agreement.

B. New Brunswick's Energy Credit

77. Canada acknowledges that, under the Large Industrial Renewable Energy Purchase Program (LIREPP), NB Power's payment to Irving Paper appeared "via a credit on Irving's electricity bills."[136] Nonetheless, Canada continues to press the Panel to find "this fact [to be] utterly irrelevant" and argues that the Panel should strike down the USDOC's determination by pretending as if NB Power had "simply made the payment for its purchases of electricity in a different manner."[137]

78. But the evidence of record before the USDOC at the time of its determination is not as Canada pretends it is.

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[133] *See* U.S. Responses to the First Set of Panel Questions, paras. 416-417; U.S. Second Written Submission, paras. 432-433.

[134] *See* U.S. Second Written Submission, paras. 432-433.

[135] *See US – Countervailing Duty Investigation on DRAMS (AB)*, paras. 174-179 (finding that, when assessing an investigating authority's determination, "[a] panel must … limit its examination to the facts that the agency should have discerned from the evidence on record" and "consider how the evidence should have fairly been understood at the time of the investigation").

[136] Canada's Second Written Submission, para. 386.

[137] Canada's Second Written Submission, para. 386.

79. It is indisputable that the evidence of record below demonstrated that the underlying premise of the LIREPP was to reduce the electricity costs for certain large industrial customers located in New Brunswick.[138]

80. It is also indisputable that the evidence demonstrated that NB Power applied the Net LIREPP credits to the monthly electricity bill of Irving Paper, which Irving Paper transferred, in part, to a division of JDIL.[139]

81. And it is indisputable that the evidence demonstrated that the Net LIREPP adjustment is provided to participating Irving companies, including JDIL, as credits applicable to the companies' total electricity charges.[140]

82. That the evidence also demonstrated that the LIREPP involved NB Power purchasing electricity from the participating Irving companies – a fact recognized by the USDOC[141] – does not mean that the USDOC erred in finding that the Net LIREPP adjustment is a financial contribution in the form of revenue foregone. As the Appellate Body recognized in *Canada – Renewable Energy*, "[i]t may … be the case that the characterization exercises does not permit the identification of a single category of financial contribution and, in that situation, … a transaction may fall under more than one type of financial contribution."[142]

83. Therefore, even if the Panel were to find that the LIREPP involved the purchase of a good, such a finding would not exclude the possibility that the LIREPP also constitutes a financial contribution in the form of revenue foregone. The Panel should decline Canada's invitation to pretend that different facts exist in this matter. Instead, the Panel should find that an unbiased and objective investigating authority could conclude that the Net LIREPP adjustment is a financial contribution in the form of revenue foregone as defined under Article 1.1(a)(1)(ii) of the SCM Agreement.

VI. ELECTRICITY – ATTRIBUTION

84. The Appellate Body's report in *US – Washing Machines* does not, as Canada suggests,[143] cripple a Member's ability to offset countervailable subsidies received by a producer with respect to inputs used in the production of a product processed from such inputs.

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[138] *See* Lumber Final I&D Memo, p. 212 (Exhibit CAN-010); New Brunswick Verification Report, pp. 19-21 (Exhibit CAN-441); New Brunswick QR, p. 19 (Exhibit CAN-259 (BCI)).

[139] *See* U.S. First Written Submission, paras. 702-704.

[140] *See* U.S. Second Written Submission, para. 444 and footnote 1049.

[141] *See* Lumber Final I&D Memo, pp. 212-213 (Exhibit CAN-010).

[142] *Canada – Renewable Energy / Canada – Feed-in Tariff Program (AB)*, para. 5.120 (referencing a situation described in the Appellate Body report in *US – Large Civil Aircraft (Second Complaint)*).

[143] *See* Canada's Second Written Submission, paras. 392-394.

85. 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.[144] As such, 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.[145]

86. Electricity is an input utilized in every aspect of the recipients' manufacturing operations, including the production of softwood lumber.

87. 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.[146] This evidence also demonstrated that these subsidies provided a benefit to every aspect of the recipients' manufacturing operations.[147]

88. 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.[148] 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. CONCLUSION

89. Madame Chairperson, members of the Panel, this concludes the U.S. opening statement. We would be pleased to respond to your questions.

[144] *See* U.S. First Written Submission, paras. 719-721; U.S. Responses to the First Set of Panel Questions, para. 431.

[145] *See*, *e.g.*, *US – Softwood Lumber IV (AB)*, paras.140-141; *EC – Large Civil Aircraft (Panel)*, paras. 7.193-7.195.

[146] *See* U.S. Second Written Submission, para. 452; U.S. Responses to the First Set of Panel Questions, paras. 433-434.

[147] *See* U.S. Second Written Submission, para. 453.

[148] *See* U.S. First Written Submission, paras. 722-736.