

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

(DS533)

**RESPONSES OF THE UNITED STATES TO THE PANEL'S
ADDITIONAL QUESTIONS TO THE PARTIES**

March 16, 2020

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<i>China – GOES (Panel)</i>	Panel Report, <i>China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States</i> , WT/DS414/R and Add.1, adopted 16 November 2012, upheld by Appellate Body Report WT/DS414/AB/R
<i>EC – Countervailing Measures on DRAM Chips (Panel)</i>	Panel Report, <i>European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea</i> , WT/DS299/R, adopted 3 August 2005
<i>US – Coated Paper (Indonesia) (Panel)</i>	Panel Report, <i>United States – Anti-Dumping and Countervailing Measures on Certain Coated Paper from Indonesia</i> , WT/DS491/R and Add.1, adopted 22 January 2018
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<i>US – Countervailing Measures (China) (Panel)</i>	Panel Report, <i>United States – Countervailing Duty Measures on Certain Products from China</i> , WT/DS437/R and Add.1, adopted 16 January 2015
<i>US – Countervailing Measures on Certain EC Products (Article 21.5 – EC) (Panel)</i>	Panel Report, <i>United States – Countervailing Measures Concerning Certain Products from the European Communities – Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS212/RW, adopted 27 September 2005
<i>US – Supercalendered Paper (Panel)</i>	Panel Report, <i>United States – Countervailing Measures on Supercalendered Paper from Canada</i> , WT/DS505/R and Add. 1, circulated 5 July 2018

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USA-004	Definition of “appropriate” from <i>The New Shorter Oxford English Dictionary</i> , L. Brown (ed.) (Clarendon Press, 1993, 4 th ed.), Volume 2, p. 103
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USA-006	Definition of “entrust” from <i>The New Shorter Oxford English Dictionary</i> , L. Brown (ed.) (Clarendon Press, 1993, 4 th ed.), Volume 2, p. 831
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USA-008	Definition of “would” from englishpage.com
USA-009	Explanation of Present Conditionals from englishpage.com
USA-010	Petitioners, “Petitions for the Imposition of Antidumping Duties and Countervailing Duties on Imports of Certain Softwood Lumber Products from Canada,” dated November 25, 2016, Exhibits 242-257.
USA-011	Government of Quebec Questionnaire Response, Exhibit QC-Other-15 (Investment program in forests subject to partial-cutting treatment) (March 15, 2017)
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USA-013	19 C.F.R. § 351.504(a) (“Grants - Benefit”) (Regulation: U.S. Department of Commerce)

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

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USA-043	Petitioner, Comments on Initial Questionnaire Responses (March 27, 2017) (public version) (excerpted, Vol. I, pp. 1-3) (“Petitioner Comments – Primary QNR Responses”)
USA-044 (BCI)	Government of Quebec Initial Questionnaire Response at Exhibit QC-STUMP-9 (Table 18)
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USA-046 (BCI)	Resolute Preliminary Calculation Memorandum (April 24, 2017)
USA-047 (BCI)	West Fraser Preliminary Calculation Memorandum (April 24, 2017)
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USA-050	Petition Exhibit 181: Ontario Crown Timber Charges for Forestry Companies
USA-051 (BCI)	Government of Nova Scotia Verification Exhibits: Exhibit NS-VE-8A, Exhibit NS-VE-8B, Exhibit NS-VE-8C, Exhibit NS-VE-8D, Exhibit NS-VE-8E, Exhibit NS-VE-8F, Exhibit NS-VE-9A, Exhibit NS-VE-9B, Exhibit NS-VE-9C, and Exhibit NS-VE-10.
USA-052	Petitioner Comments on Initial Questionnaire Responses (March, 27, 2017), Exhibit 26
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USA-056	19 C.F.R. § 351.309(c)(2) (“Written Argument”) (Regulation: U.S. Department of Commerce)

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USA-057	Government of Quebec Initial Questionnaire Response (March 13, 2017), Exhibit QC-STUMP-20 (“Sustainable Forest Development Act”)
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USA-060	“Timeline for Log Exports in British Columbia”, Exhibit BC-VER-7, submitted by the Government of British Columbia in SC Paper from Canada – Expedited Review
U.S. Second Written Submission	
USA-061	List of Case-Related Documents
USA-062	Initial Non-Stumpage Questionnaire (January 19, 2017)
USA-063	Initial Stumpage Questionnaire (January 19, 2017)
USA-064	Initial Questionnaire Addendum (January 31, 2017)
USA-065	Complete Set of Verification Outlines Issued to Parties
USA-066	Petitioner’s Comments on Initial Questionnaire Responses (March 27, 2017) (excerpted, Vol. I, pp. 1-71)
USA-067	Canada and British Columbia Case Brief Vol. III (July 27, 2017) (“GOC/GBC Case Brief”)
USA-068	British Columbia and the B.C. Lumber Trade Council Rebuttal Brief Vol. III (August 4, 2017) (“GBC/BCLTC Rebuttal Brief”)
USA-069	Resolute First Supplemental Questionnaire Response (Stumpage) (April 12, 2017)
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USA-071	Petitioner Rebuttal Brief (August 7, 2017)
USA-072	USDOC Memorandum, “Hearing Transcript on CVD Issues,” dated August 24, 2017

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USA-073	USDOC Response to Requests for Clarification by Canadian Parties (issued Feb. 3, 2017)
USA-074	Supplemental Questionnaire to Resolute (issued Mar. 30, 2017)
USA-075	Government of Quebec Questionnaire Response, Exhibit QC-STUMP-22 (excerpt from <i>SFDA</i> Regulations, chapter A-18.1, r.7, section 89 of the regulation respecting standards of forest management for forests in the domain of the State (this portion of Exhibit QC-STUMP-22 is not included in Exhibit CAN-197))
USA-076	Definition of “purchase” from <i>The New Shorter Oxford English Dictionary</i> , L. Brown (ed.) (Clarendon Press, 1993, 4 th ed.), Volume 2, p. 2418
USA-077	Government of Canada Counter-Memorial, ICSID Case No. ARB(AF)/12/3 (Aug. 22, 2014) (excerpted)
USA-078	Definition of “group” from Oxford English Dictionary Online
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USA-079	Definition of “type” from <i>The New Shorter Oxford English Dictionary</i> , L. Brown (ed.) (Clarendon Press, 1993, 4 th ed.), Volume 2, p. 3441
USA-080	Definition of “function” from <i>The New Shorter Oxford English Dictionary</i> , L. Brown (ed.) (Clarendon Press, 1993, 4 th ed.), Volume 1, p. 1042
USA-081	Definition of “carry out” from <i>The New Shorter Oxford English Dictionary</i> , L. Brown (ed.) (Clarendon Press, 1993, 4 th ed.), Volume 1, p. 343
USA-082	Definition of “normally” from <i>The New Shorter Oxford English Dictionary</i> , L. Brown (ed.) (Clarendon Press, 1993, 4 th ed.), Volume 2, p. 1940
USA-083	Definition of “vested” from <i>The New Shorter Oxford English Dictionary</i> , L. Brown (ed.) (Clarendon Press, 1993, 4 th ed.), Volume 2, p. 3570
USA-084	Government of British Columbia Initial Questionnaire Response (March 14, 2017), Exhibit BC-S-124
USA-085	Government of British Columbia Initial Questionnaire Response (March 14, 2017), Exhibit BC-S-125
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USA-087 (BCI)	Government of British Columbia Verification Exhibit VER-12
USA-088 (BCI)	Market Memorandum, New Brunswick attachment, Table 2.1
USA-089	Canfor 4th Supplemental Questionnaire Narrative Response (May 31, 2017)
USA-090	USDOC Administrative Protective Order (November 25, 2016)
USA-091	“BC Timber Sales Opportunity Review: Final Report” (Exhibit BC-SUPP3-6 attached to BC Supplemental Questionnaire Response (May 30, 2017))
U.S. Comments on Canada’s Responses to the Panel’s Second Set of Questions	
USA-092 (BCI)	Government of Quebec Verification Exhibit VE-QC-29 (BCI)
USA-093	Government of Nova Scotia Verification Exhibit NS-VE-1 (“Minor Corrections of the Government of Nova Scotia”)

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

Response:

1. This question is addressed to Canada.

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

Response:

2. This question is addressed to Canada.

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

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

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

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

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

Response:

3. Canada would need to reconcile its own apparently conflicting positions, which are evidenced by the two observations quoted in the question. In doing so, Canada would need to

explain why it did not argue to the U.S. Department of Commerce (“USDOC”) that the log market in the tidewater portion of the interior is a separate market unique from the rest of the interior, but Canada subsequently asserted to the Panel that the tidewater region is a purported “sub-market” that is “distinct from the B.C. Interior”.¹ If Canada attempts to reconcile its divergent positions in its response to the Panel’s question, the United States anticipates that it would comment on Canada’s response.

4. That being said, the United States offers the following comments in response to the remainder of the Panel’s question.

5. As an initial matter, the United States observes that Canada, in paragraph 209 of its first written submission, has misstated the substance of the USDOC’s determination. Canada asserts that:

Commerce largely relied on exports from the Tidewater sub-market to support its finding, explaining that exports from the Tidewater—a sub-market where none of the B.C. respondent companies operate during the POI—accounted for a “significant amount” of total exports from the province.²

6. In reality, the USDOC did not state that exports from the tidewater region alone “accounted for a ‘significant amount’ of total exports from the province”.³ Rather, the USDOC found that exports from the tidewater region and the southern interior “account for a significant amount of the total exports from the entire province.”⁴ In a footnote supporting this finding, the USDOC referenced “GOC Primary QNR Response Part 1 at page LEP-5, which shows that exports from the Tidewater Interior account for approximately eight percent of total exports from the entire province and exports from the Southern Interior account for approximately two percent of total exports from the entire province.”⁵

7. The USDOC also referred to “other record evidence that logs from different parts of the interior are exported.”⁶ As the USDOC explained:

¹ First Written Submission of Canada (October 5, 2018) (“Canada’s First Written Submission”), para. 209.

² Canada’s First Written Submission, para. 209 (underline added).

³ Canada’s First Written Submission, para. 209.

⁴ *Memorandum to Gary Tverman 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. 147-148 (Exhibit CAN-010) (In context, the USDOC’s use of the term “[t]hese exports” can only refer to “logs from different parts of the interior” in the preceding sentence, which was a reference to exports from the tidewater region and the southern interior. *Ibid.*, p. 147).

⁵ Lumber Final I&D Memo, p. 148, footnote 885 (Exhibit CAN-010) (underline added).

⁶ Lumber Final I&D Memo, pp. 147-148, footnote 884 (Exhibit CAN-010).

Specifically, the record demonstrates that there are significant exports of logs from the tidewater interior and southern interior. Further, record information shows that there were some requests to export BC logs to Alberta during the POI. *See* GOA Primary QNR Response Part 1 at Exhibit AB-S-3, Table 3. While this data does not detail the source or destination of these logs, given the GBC’s argument that the transportation costs limit how far the logs can be transported, it is reasonable to presume that the logs were coming from the eastern portion of the BC Interior.⁷

8. The USDOC acknowledged that the evidence showed that more of the exports from the interior came from the tidewater region than the southern interior, and the USDOC explained how it took that evidence into account together with other evidence:

[G]iven that there are substantial exports from various sections of the interior, it is feasible to export logs from the interior. While these exports may predominantly originate from a different area of the interior [understood in context, the tidewater region], record evidence reflects that the vast majority of mills in the interior overlap with one another and with potential export markets,^[886] and the impact on the border regions of the interior would have a similar “ripple effect” on the BC interior.⁸

In footnote 886, the USDOC referred to “Petitioner Comments – Primary QNR Responses at Exhibit 19” and explained that:

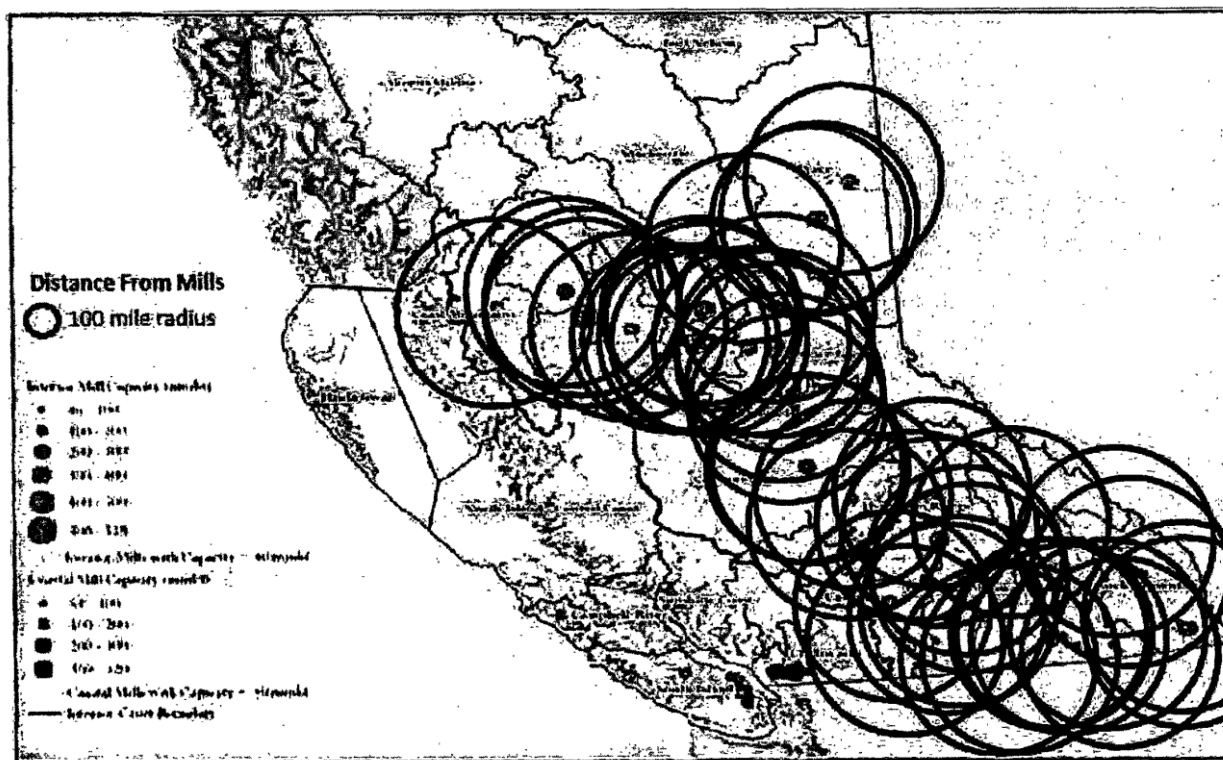
In this exhibit, the petitioner provided a map, in which a 100-mile radius is drawn around the sawmills in the BC interior, which demonstrates that the BC interior sawmills all overlap with each other. We note that this figure is consistent with the findings of the GOC/GBC’s own expert, as the Bustard Report states that “{i}n most Interior areas it is economically feasible to truck export logs for up to about a 7-hour return cycle from harvest sites. This represents approximately a 228 km (142 mile) each way.”). *See* GOC Primary QNR Response Part 1 at Exhibit LEP-2 at 10. As such, we find that the 100-mile radius used by petitioner is a conservative estimate to the degree in which BC interior sawmills all overlap with each other.⁹

⁷ Lumber Final I&D Memo, pp. 147-148, footnote 884 (underline added) (Exhibit CAN-010).

⁸ Lumber Final I&D Memo, p. 148 (Exhibit CAN-010).

⁹ Lumber Final I&D Memo, p. 148, footnote 886 (Exhibit CAN-010).

The map from Petitioner Comments – Primary QNR Responses at Exhibit 19, referenced in the above quotation, is reproduced below.¹⁰



As the image above shows, the overlapping radii transcend the coastal region, the tidewater region, and the non-tidewater portion of the interior, as well as transcending the British Columbia borders with the United States and Alberta.

9. Furthermore, while Canada’s first written submission offers reasons why the tidewater region is “distinct” from the non-tidewater interior,¹¹ the USDOC addressed many of those arguments when the Government of Canada made them during the investigation – though, the Government of Canada did not go as far as to argue to the USDOC that the tidewater region is a separate market or sub-market. Specifically, the USDOC found, based on positive record evidence, that logs from the tidewater region can easily be transported to ports located in the coastal region, but there also are at least seven highways that cross between the BC coast and the BC interior, and the mandatory respondents maintain mills along those highways.¹² Additionally, the USDOC explained that mills in the southern interior and along the eastern

¹⁰ See Exhibit USA-019, p. 132 of the PDF.

¹¹ See Canada’s First Written Submission, para. 209.

¹² Lumber Final I&D Memo, p. 147 (Exhibit CAN-010) (citing GOC GBC Primary QNR Part 1, p. LEP-6 (Exhibit CAN-049) (BCI)).

border of British Columbia would have the ability to export logs out of the province to the United States and Alberta.¹³

10. With respect to Canada’s suggestion that the “species mix” in the tidewater region demonstrates that that region is far more similar to the Coast, the USDOC explained that some species overlapped between the coast and interior harvest and others were substitutable for each other and are used to produce similar products, including lumber.¹⁴ The record evidence simply does not support the distinction that Canada now attempts to draw between the tidewater region and the remainder of the interior.

11. Accordingly, as shown above, the evidence did not support the USDOC treating the tidewater region of British Columbia as a market distinct from the rest of the British Columbia interior. Additionally, it would be incorrect to suggest, as the question appears to do, that the USDOC considered exports from the tidewater region alone – to the exclusion of other exports from the interior – as being representative of exports from the interior. The USDOC took into account all log exports from the interior, explained how it did so, and gave its reasons for and pointed to the evidence that supported its conclusion. In sum, the USDOC made a determination that an unbiased and objective investigating authority could have made in light of the facts and arguments before it.¹⁵

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

In paragraphs 647-649 of its first written submission, Canada contends, using mock examples, that the application of a conversion factor based on Eastside Washington logs (which is understated) to the British Columbia interior harvest overstates the volume of logs that entered mills in British Columbia during the period of investigation.¹⁶ Based on these examples, Canada states in paragraph 650 of its first

¹³ See, e.g., Lumber Final I&D Memo, pp. 147-148, footnotes 884, 885, and 886 (Exhibit CAN-010).

¹⁴ Lumber Final I&D Memo, pp. 146-47 (Exhibit CAN-010).

¹⁵ See *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.

¹⁶ A footnote in the Panel’s question indicates that “[t]he Panel notes in this regard Canada’s statement that irrespective of whether the conversion factor is applied to the USD/m³ price of the BC logs or the USD/MBF benchmark price the result is mathematically the same.” While Canada is correct that the mathematical result would be the same in Canada’s hypothetical scenario irrespective of whether the conversion factor is applied to the USD/m³ price of the BC logs or the USD/MBF benchmark price, the premise of Canada’s hypothetical scenario is flawed, as explained in the U.S. responses to the subparts of this question. The USDOC did not apply a conversion factor to BC logs. Rather, the USDOC applied a conversion factor to Washington state logs so that it could compare

written submission that it is crucial that the conversion factors accurately reflect the volumetric characteristics of the logs to which the conversion factor is to be applied.

- a. To the United States. If the United States disagrees that the application of a conversion factor based on Eastside Washington logs overstated the volume of logs that entered mills in British Columbia during the POI, please explain why. In doing so, please also explain why the United States would disagree with Canada’s statement that by overstating the volume of logs that entered mills in British Columbia (i) one would undervalue the unit price paid by British Columbia respondent companies and (ii) conclude that there was a benefit.**

Response:

12. The United States disagrees that the USDOC’s use of a conversion factor based on Eastside Washington logs overstated the relevant volumes.¹⁷ In the first place, Canada’s assertion is nothing more than a tautology: if one assumes overstated volumes, one assumes understated prices. Canada’s mere assumption of overstated volumes should be rejected. There is no basis for finding that the volumes were overstated as a result of the USDOC’s approach.¹⁸ Seen for what it is, Canada’s preference for a BC-based conversion factor is not really based on purported differences between Washington and BC measurements, but rather is based on Canada’s overriding preference for using the conversion factor it developed as part of its self-commissioned BC Dual-Scale Study. The points Canada has raised in fact have no bearing, either mathematically or in terms of the objective evidence, on the “accuracy” of the USDOC’s benchmark calculation. For these reasons, the USDOC explained that it was not persuaded by Canadian respondents’ arguments during the investigation that a conversion factor should be derived from BC measurements.¹⁹

13. Canada’s position relies on two faulty arguments: (1) Canada argues that the “volumetric characteristics of the logs” are different in the relevant parts of British Columbia and

the price of such logs, which were reported in USD/MBF, to the price of stumpage (not logs) purchased by respondents in British Columbia, which were reported in \$CAD/m³. Canada’s statement concerning mathematical equivalence does not support Canada’s contention that the USDOC should have used a BC conversion factor.

¹⁷ With respect to subpart (a) of question 285, the reference to “the volume of logs that entered mills in British Columbia” does not reflect the relevant inquiry. The relevant inquiry relates to the price paid for stumpage, *i.e.*, the right to harvest standing timber. The USDOC did not analyze or estimate “logs that entered mills” in British Columbia. Rather, the USDOC took reported stumpage in British Columbia and compared that to a benchmark, which was logs in Washington state, and those benchmark log prices in Washington state had to be converted from USD/MBF to \$CAD/m³. Canada’s assertion that the conversion factor overstated anything is beside the point. The USDOC used the best information it had to do the best conversion and comparison possible under the circumstances.

¹⁸ See Lumber Final I&D Memo, pp. 58-61 (Comment 19) and 62-65 (Comment 21) (Exhibit CAN-010).

¹⁹ See Lumber Final I&D Memo, pp. 58-61 (Comment 19) and 62-65 (Comment 21) (Exhibit CAN-010).

Washington, despite evidence to the contrary;²⁰ and (2) Canada argues that the conversion factor it developed in its self-commissioned BC Dual-Scale Study is more probative because, *inter alia*, it was based on measurements taken in British Columbia.²¹

14. These arguments fail because they are not supported by the evidence. The USDOC addressed these arguments in Comments 19 and 21 of its final issues and decision memorandum.²²

15. First, the USDOC explained why it disagreed with Canadian respondents’ argument that the timber in British Columbia and Washington state is so incomparable that using a conversion factor based on Washington state logs would yield inaccurate price comparisons. The USDOC explained that:

On this record, we have a Washington state-priced benchmark that is in board feet and we need to convert that price to cubic meters. The Washington state price in cubic meters would be based upon the cubic meters of the tree in Washington state, not BC.

Therefore, we do not agree with the proposal that it would be more accurate to convert the Washington state benchmark prices using a conversion factor derived from trees in BC, especially given that we have a conversion factor on the record that is based on trees in Washington state.²³

16. The USDOC recalled that the close comparability of timber grown in the U.S. Pacific Northwest (“PNW”) and British Columbia had formed the basis for its benchmark selection of the Washington Department of Natural Resources (“WDNR”) log price data.²⁴ Specifically, the USDOC had determined that standing timber in the U.S. PNW and British Columbia were comparable based on evidence that the same timber species grow in each region and are part of a vast forest region that stretches over the U.S.-Canadian border to encompass both the U.S. PNW and British Columbia.²⁵ Among other things, the USDOC observed that:

[T]he forests of the U.S. PNW and British Columbia are contiguous, extend across the geopolitical border, and that the

²⁰ Canada’s First Written Submission, para. 650.

²¹ See Canada’s First Written Submission, para. 694.

²² See Lumber Final I&D Memo, pp. 58-61 (Comment 19) and 62-65 (Comment 21) (Exhibit CAN-010).

²³ Lumber Final I&D Memo, pp. 60-61 (Exhibit CAN-010).

²⁴ See Lumber Final I&D Memo, pp. 63-64 (Exhibit CAN-010).

²⁵ Lumber Final I&D Memo, pp. 63-64 (Exhibit CAN-010).

same species and growing conditions prevail in the U.S. PNW and British Columbia.²⁶

Even more specifically, the USDOC observed that the species of trees harvested by the respondents in British Columbia are the same species that grow in the U.S. PNW.²⁷

17. The USDOC then determined that the WDNR monthly survey price data for delivered logs were the best information on the record for calculating the benchmark prices.²⁸ The USDOC further refined its benchmark selection by using only the data from the interior of Washington, because the species grown there are more comparable to those in the British Columbia interior where the respondents were located.²⁹ Then, because the WDNR log price data reflect unit prices without volumes, the USDOC calculated the annual U.S. log price by taking a simple average of the monthly unit prices by species.³⁰ In doing so, the USDOC explained that the WDNR data represented the most reliable price information on the record, notwithstanding that the WDNR price data do not contain volumetric information.³¹

18. Nevertheless, because the log prices published by the WDNR are expressed in U.S. dollars per MBF, and the reported purchase prices of the British Columbia respondents are stated in cubic meters, the USDOC needed to convert the WDNR U.S. prices into cubic meters.³² Given the USDOC’s selection of a benchmark based on Washington state prices, the USDOC explained in the final issues and decision memorandum that “[t]he Washington state price in cubic meters would be based upon the cubic meters of the tree in Washington state, not BC. Therefore, we do not agree with the proposal that it would be more accurate to convert the Washington state benchmark prices using a conversion factor derived from trees in BC.”³³

²⁶ Lumber Final I&D Memo, p. 64 (Exhibit CAN-010).

²⁷ Lumber Final I&D Memo, p. 63 (Exhibit CAN-010).

²⁸ 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. 50-52 (Exhibit CAN-008). The only other log price data for the U.S. PNW that the USDOC had on the record was the information collected by Mason, Bruce & Girard for Forest2Market. The USDOC found the Forest2Market data unreliable because it was prepared for the investigation, and the data and search parameters underlying the prices in the report were not on the record. See Lumber Final I&D Memo, pp. 61-62 (Exhibit CAN-010). In contrast, the USDOC concluded that the WDNR price data was “collected on a monthly-basis, in the ordinary course of business by a government agency, and are in that sense reliable. Moreover, the prices reflected in the data are market-based and representative of species purchased by the BC respondents during the POI.” Lumber Final I&D Memo, p. 62 (Exhibit CAN-010).

²⁹ Lumber Preliminary Decision Memorandum, p. 53 (Exhibit CAN-008).

³⁰ Lumber Preliminary Decision Memorandum, p. 53 (Exhibit CAN-008).

³¹ See Canada’s First Written Submission, para. 693.

³² Lumber Final I&D Memo, pp. 58, 60 (Exhibit CAN-010).

³³ Lumber Final I&D Memo, pp. 60-61 (Exhibit CAN-010).

19. The USDOC also addressed the only other conversion factor on the record, the BC Dual-Scale Study, which was derived using measurements in British Columbia.³⁴ The USDOC explained that the conversion factor in the BC Dual-Scale Study would not appear to have any advantage in terms of “accuracy” over the U.S. Forest Service (“USFS”) study, because it was based only on trees from British Columbia, whereas the selected benchmark was the price of logs in Washington state.³⁵ The USDOC explained in the final issues and decision memorandum:

[G]iven our concerns with the lack of a valid sampling methodology used to produce the data in the BC Dual Scale Study and the applicability of a conversion factor based on BC trees used on a price for Washington trees, we have not relied on the information in the BC Dual Scale Study.³⁶

20. Thus, the USDOC explained that the evidentiary basis for Canada’s preferred conversion factor was infirm because of flaws in the design of the BC Dual-Scale Study. The USDOC found that it could only rely on the evidence contained in the USFS study, which provided the only other usable volumetric conversion factor on the record.³⁷

21. The USDOC explained that it had good reasons for relying on the USFS study. Not only was the USFS conversion factor based on trees from Washington state, thereby aligning with the trees reflected in the WDNR benchmark data, but it was also produced by an impartial government agency in the ordinary course of business.³⁸ As the initial trier of fact, the USDOC was required to make a determination based on the evidence before it on the record of the investigation, and it did so here, based on the best available evidence. The record contained one useable conversion factor which, under these circumstances, was appropriate and accurate, and the USDOC explained its reasons for relying on that evidence.

22. When examining such a claim, a WTO panel does not conduct a *de novo* evidentiary review, but instead fulfills a “role as *reviewer* of agency action” and not as “*initial trier of fact*.”³⁹ The Panel should assess whether the USDOC “properly established the facts and evaluated them in an unbiased and objective manner.”⁴⁰ 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, could have – not would have – reached the same conclusions that the USDOC

³⁴ Lumber Final I&D Memo, pp. 59-60 (Exhibit CAN-010).

³⁵ Lumber Final I&D Memo, p. 60 (Exhibit CAN-010).

³⁶ Lumber Final I&D Memo, p. 61 (Exhibit CAN-010).

³⁷ Lumber Final I&D Memo, p. 60 (Exhibit CAN-010).

³⁸ Lumber Final I&D Memo, p. 60 (Exhibit CAN-010).

³⁹ *US – Countervailing Duty Investigation on DRAMS (AB)*, paras. 187-188 (italics in original).

⁴⁰ *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.

reached.

- b. To the United States. Please explain why the United States would disagree with Canada’s view, stated at paragraph 650 of Canada’s first written submission, that to accurately compare Washington state prices per-volumetric unit to the prices per-volumetric unit paid by British Columbia respondents companies for BC interior logs, it would be crucial to use the conversion factors that accurately reflect the volumetric characteristics of the logs to which the conversion factor is to be applied, which are logs in British Columbia and not Washington.**

Response:

23. Contrary to Canada’s suggestion, as reflected in subpart (b) of the question (“the logs to which the conversion factor is to be applied”), the USDOC did not apply the conversion factor to logs in British Columbia. Rather, the USDOC applied the conversion factor to prices for logs in Washington, and then converted currencies, and then made appropriate adjustments, to take a Washington log price in USD/MBF and convert it to a benchmark that could be used to make a benchmark comparison to British Columbia stumpage (not logs) in \$CAD/m³.

24. Canada’s assertions are based on the misunderstanding that the USDOC’s calculation somehow converted the volume of British Columbia interior logs reported by the respondents. But the USDOC never did so. To be clear, the Canadian parties reported their British Columbia interior purchases in Canadian dollars per cubic meter, but at no point did the USDOC convert or adjust the volumes of these reported purchases of timber from the British Columbia interior.⁴¹ Rather, the USDOC converted the U.S. benchmark based on the WDNR price data, because that benchmark price is for logs in Eastern Washington state and is expressed in U.S. dollars per thousands of board feet (MBF).⁴² In order to compare the benchmark price to the reported British Columbia interior purchases, the USDOC converted the WDNR benchmark unit price to the same units as the British Columbia interior purchases.⁴³

25. After converting the monthly WDNR U.S. logs prices into cubic meters, the USDOC then converted those prices into Canadian dollars per cubic meter using monthly exchange rates published by the U.S. Federal Reserve for the period of investigation.⁴⁴ Finally, to reflect prevailing market conditions in British Columbia, the USDOC made several adjustments to the benchmark price (*i.e.*, the Washington state log price), including for cutting rights fees and costs for access, harvesting, hauling, silviculture, and forest management.⁴⁵ The USDOC then

⁴¹ Lumber Final I&D Memo, p. 58 (Exhibit CAN-010).

⁴² Lumber Final I&D Memo, pp. 58, 60 (Exhibit CAN-010).

⁴³ Lumber Final I&D Memo, pp. 58, 60 (Exhibit CAN-010).

⁴⁴ Lumber Preliminary Decision Memorandum, p. 53 (Exhibit CAN-008).

⁴⁵ Lumber Final I&D Memo, pp. 73-74 (Exhibit CAN-010).

compared the Washington state benchmark price with each respondent’s purchase prices of Crown-origin standing timber in British Columbia.⁴⁶

26. Although Canada questions the precision of the volumetric conversion factor in the USFS Study and its impact on unit price,⁴⁷ it was the only usable conversion factor on the record and was considered reliable for a number of reasons. Given the USDOC’s selection of a benchmark based on Washington state prices, the USDOC explained in the final issues and decision memorandum that “[t]he Washington state price in cubic meters would be based upon the cubic meters of the tree in Washington state, not BC. Therefore, we do not agree with the proposal that it would be more accurate to convert the Washington state benchmark prices using a conversion factor derived from trees in BC.”⁴⁸

27. The USDOC further explained that, among the multiple conversion factors contained in the USFS Study (*i.e.*, factors specific to the Washington coast (6.76) and Washington interior (5.93)), the USDOC selected the most precise measurement by using the 5.93 cubic meters per MBF conversion factor applicable to the Washington state interior, which contained trees that were most similar to those in the British Columbia interior where respondents were located, as opposed to the trees in coastal Washington.⁴⁹ The conversion factor therefore has particular relevance because it relates to the species and growing conditions likely to appear in the WDNR log price survey data, which conditions the USDOC found to be comparable to those of British Columbia.

28. Thus, although Canada contends that it would be more accurate to derive a conversion factor from trees in British Columbia, the USFS study provided a conversion factor with specific relevance to the USDOC’s chosen benchmark data.⁵⁰ In other words, the USDOC provided a reasoned explanation that is supported by the evidence on the record.

29. Canada’s assertion that “accurate” comparisons depend on “accurate” numbers reflects only that Canada disagrees with the USDOC’s determination, but otherwise is devoid of any content. The relevant question is whether the USDOC explained its determination to use the conversion factor that it chose and whether the evidence supports that determination. Here, the USDOC did not use Canada’s suggested conversion factor, nor did the USDOC invent a conversion factor of its own. Rather, the USDOC relied on an empirically based conversion factor developed in the literature and which has been relied upon in many contexts over many years (*e.g.*, the USDOC had found the USFS Study reliable and used it in the prior *Lumber IV*

⁴⁶ Lumber Preliminary Decision Memorandum, p. 54 (Exhibit CAN-008).

⁴⁷ See Canada’s First Written Submission, paras. 646-650.

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

⁴⁹ See Lumber Preliminary Decision Memorandum, p. 53 (Exhibit CAN-008).

⁵⁰ See First Written Submission of the United States of America (November 30, 2018) (“U.S. First Written Submission”), para. 439.

investigation and in *Supercalendared Paper from Canada – Expedited Review*).⁵¹ Canada’s speculation about hypothetical “accuracy” should be rejected.

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

Response:

30. Canada’s contention is wrong and relies upon a misunderstanding of the record and the relevant calculations. As explained above in the U.S. responses to the earlier subparts of this question, Canada’s understanding that “the only log volumes that are being converted were the BC log volumes” is incorrect. The USDOC did not convert BC log volumes at any point in its calculation. Rather, the USDOC converted the Washington state benchmark based on the WDNR price data, because that benchmark price is for logs in Eastern Washington state and is expressed in U.S. dollars per thousands of board feet (MBF).⁵² In order to compare the benchmark price to the reported British Columbia interior purchases, the USDOC converted the WDNR benchmark unit price to the same units as the British Columbia interior purchases.⁵³ The USDOC did not apply the conversion factor to logs in British Columbia. The USDOC took a logical approach: it applied the conversion factor to logs in Washington, then converted currencies, and then made adjustments, to take a Washington log price in USD/MBF and convert it to a benchmark that could be used to make a benchmark comparison to British Columbia stumpage (not logs) in \$CAD/m³. Only after converting the WDNR unit price into Canadian dollars and cubic meters, and making certain adjustments, did the USDOC compare the Washington state benchmark to the reported sales in British Columbia.

31. The USDOC explained this approach, and the USDOC’s approach is supported by the evidence on the record. Canada has, at no point, established that the information it proposed for the conversion factor is any more or less “accurate” than any other factor. Nor has Canada established that the conversion factor the USDOC relied upon was “inaccurate.” It would be

⁵¹ Lumber Final I&D Memo, p. 60 (Exhibit CAN-010).

⁵² Lumber Final I&D Memo, pp. 58, 60 (Exhibit CAN-010).

⁵³ Lumber Final I&D Memo, pp. 58, 60 (Exhibit CAN-010).

legal error to assume the “accuracy” of the conversion factor or for a reviewer to determine for itself what constitutes “more accurate” in these circumstances. Rather, the role of the reviewing panel is to determine whether the USDOC explained the basis for its determination in the first place and whether that determination is supported by evidence on the record of the investigation. Here, the USDOC made a determination that an unbiased and objective investigating authority could have made in light of the facts and arguments before it.

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

Response:

32. This question is addressed to Canada.

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

Response:

33. This question is addressed to Canada.