UNITED STATES – COUNTERVAILING DUTY MEASURES ON SOFTWOOD LUMBER FROM CANADA

(DS533)

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TABLE OF REPORTS

Short Form	Full Citation
Japan – DRAMs (Korea) (AB)	Appellate Body Report, *Japan – Countervailing Duties on Dynamic Random Access Memories from Korea*, WT/DS336/AB/R and Corr.1, adopted 17 December 2007
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 – Countervailing Measures on Certain EC Products (Article 21.5 – EC) (Panel)	Panel Report, *United States – Countervailing Measures Concerning Certain Products from the European Communities – Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS212/RW, adopted 27 September 2005
US – Softwood Lumber IV (AB)	Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/AB/R, adopted 17 February 2004, as modified by Appellate Body Report WT/DS257/AB/R
US – Washing Machines (AB)	Appellate Body Report, *United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea*, WT/DS464/AB/R, adopted 26 September 2016

Madame Chairperson, members of the Panel:

1. Good afternoon. We will, once again, get right into the issues on today's agenda.

I. THE USDOC'S ATTRIBUTION OF ELECTRICITY SUBSIDIES TO PRODUCERS OF SOFTWOOD LUMBER

2. Both the GATT 1994[1] and SCM Agreement[2] contemplate the application of countervailing duties for subsidies that may benefit more than the product under investigation. For example, Article VI:3 of the GATT 1994 and footnote 36 to Article 10 of the SCM Agreement refer to a subsidy bestowed "indirectly," suggesting that some subsidies could benefit more than one product or activity of a recipient.[3]

3. In determining whether and what amount of subsidy has been bestowed on the production, manufacture, or export of a product, a Member may examine a subsidy and determine that the benefits received from the countervailable subsidy cannot be linked to a particular product but rather would be spread across all of the products manufactured by the company. A subsidy that benefits all products would accordingly be attributed to all sales.[4]

4. In this regard, nothing in the GATT 1994 or SCM Agreement suggests an investigating authority need attempt to trace subsidy benefits from receipt to the moment of actual use (even were this possible). As the Appellate Body has observed, "the appropriate inquiry into the existence of a product-specific tie requires a scrutiny of the design, structure, and operation of the subsidy at issue, aimed at ascertaining whether the bestowal of that subsidy is connected to, or conditioned on, the production or sale of a specific product."[5]

5. The USDOC[6] considered the design, structure, and operation of the electricity subsidies at issue and determined that each provincial subsidy was not connected to, or conditioned on, the production or sale of a specific product at the point of bestowal. Electricity is an input utilized in every aspect of the manufacturing operations of the recipient companies, including the production of softwood lumber. The electricity subsidies were provided to the overall operations of the recipient companies and therefore attributable to the sales of all products produced by these companies, including softwood lumber.

6. The design, structure, and operation of the Electricity Purchase Agreements ("EPA") that BC Hydro entered into with Tolko and West Fraser, as well as the bestowal of payments pursuant to these agreements, is not connected to, or conditioned on, the production or sale by Tolko and West Fraser of a particular product or products. The electricity that Tolko and West Fraser sold to BC Hydro during the period of investigation, for which they received more

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

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

[3] U.S. First Written Submission, paras. 714-715.

[4] U.S. First Written Submission, para. 720.

[5] *US – Washing Machines (AB)*, para. 5.273.

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

revenue than they otherwise should have earned, was not tied to the production of a good other than the product under investigation. The revenue earned for this input thereby benefited Tolko's and West Fraser's overall operations.[7]

7. The design, structure, and operation of the Green Power Purchase Program ("PAE 2011-01") that Hydro-Quebec entered into with Resolute, as well as the bestowal of payments pursuant to the PAE 2011-01, is not connected to, or conditioned on, the production by Resolute of a particular product or products. The electricity that Resolute sold to Hydro-Quebec during the period of investigation, for which it received more revenue than it otherwise should have earned, was not tied to the production of a good other than the product under investigation. The revenue earned for this input thereby benefited Resolute's overall operations.[8]

8. Finally, the design, structure, and operation of the LIREPP, as well as the bestowal of Net LIREPP credits, is not connected to, or conditioned on, the production or sale by the Irving Companies of a particular product or products. The credit received for NB Power's purchases of electricity from the participating Irving Companies benefited the Irving Companies' overall operations.[9]

9. In each situation, the USDOC provided a reasoned and adequate explanation for why the financial contributions received by each of the recipient companies benefited their overall operations, including softwood lumber. The USDOC's conclusions could have been reached by an unbiased and objective investigating authority in light of the facts and arguments before it. None of Canada's arguments show that the USDOC acted inconsistently with Articles 10, 19.1, 19.3, and 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 when it attributed the relevant provincial electricity subsidies to the sale of all products produced by the recipient companies, including softwood lumber.

II. THE SCM AGREEMENT AND THE GATT 1994 DO NOT REQUIRE INVESTIGATING AUTHORITIES TO PROVIDE CREDITS FOR INSTANCES IN WHICH THERE IS NO SUBSIDY

10. The U.S. first written submission demonstrates that nothing in the covered agreements requires an investigating authority, when determining the amount of the benefit conferred by a financial contribution, to provide a credit for instances in which other financial contributions do not confer a benefit.[10] Canada's argument that the USDOC was required to do so when it calculated the amount of the benefit conferred by New Brunswick's and British Columbia's provision of standing timber lacks any merit.

11. The very arguments Canada makes in this dispute were rejected previously by the panel in *US – Anti-Dumping and Countervailing Duties (China)*. That panel report, and other prior

[7] U.S. First Written Submission, paras. 723-726.

[8] U.S. First Written Submission, paras. 727-731.

[9] U.S. First Written Submission, paras. 732-736.

[10] *See* U.S. First Written Submission, paras. 472-527.

panel and Appellate Body reports, confirm that Article 14 of the SCM Agreement, through its guidelines, gives Members' investigating authorities discretion to develop appropriate methodologies to calculate the benefit of a subsidy.[11] In particular, nothing in Article 14(d) of the SCM Agreement imposes an obligation on Members to conduct an aggregate analysis, nor does Article 14(d) require Members to provide credit in the benefit calculation when a government provides goods for adequate remuneration.

12. Likewise, no such obligation is imposed by Articles 1.1(b), 19.3, or 19.4 of the SCM Agreement, nor by Article VI:3 of the GATT 1994. Canada refers to Article 1.1(b) of the SCM Agreement only in passing, and offers no explanation for how the terms of Article 1.1(b) establish or contribute to the establishment of the obligation Canada proposes, nor any explanation of how the USDOC acted inconsistently with Article 1.1(b).

13. Canada's arguments concerning Articles 19.3 and 19.4 of the SCM Agreement, and Article VI:3 of the GATT 1994, fail because Canada's proposed interpretation of those provisions would override the text of Article 14 of the SCM Agreement with obligations in other provisions of the SCM Agreement and the GATT 1994 that have no textual connection to the "benefit to the recipient" guidelines set forth in Article 14, and would instead impose a specific and far-reaching obligation when calculating the amount of a subsidy.

14. In addition to having no support in the text of the covered agreements, Canada's proposed interpretation has troubling implications. Because Canada attempts to locate the purported obligation to provide credit for "negative comparison results" in Articles 19.3 and 19.4 of the SCM Agreement, and Article VI:3 of the GATT 1994, such an obligation, if it were found to exist, could not be limited to subparagraph (d) of Article 14. It would necessarily apply to all of Article 14, and would require that credit be provided whenever an investigating authority found that any financial contribution did not provide a benefit. Thus, Members would be required to provide credit across different types of input products and even across different types of subsidies. The amount of a simple grant of money, for example (perhaps the most basic and obvious form of subsidy), might need to be reduced if, separately, a good was provided to the grant recipient for more than adequate remuneration (hence, a so-called "negative benefit"). That could be true regardless of whether or not the investigating authority was examining the provision of the good. The investigated recipient might raise the issue during the investigation and request an offset.

15. Canada has not identified any limiting principle that would confine the purported aggregation/offset obligation to particular input subsidies or prevent the obligation, if it were found to exist, from applying across different types of subsidies. As the United States has demonstrated, and as the panel in *US – Anti-Dumping and Countervailing Duties (China)* agreed, there simply is no support in the terms of the covered agreements or in logic for the obligation that Canada asks the Panel to invent.

[11] *See US – Anti-Dumping and Countervailing Duties (China) (Panel)*, para. 11.55; *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC) (Panel)*, para. 7.121; *US – Softwood Lumber IV (AB)*, paras. 91-92; *Japan – DRAMs (Korea) (AB)*, para. 191.

16. Rather, each time British Columbia and New Brunswick provided standing timber to one of the respondents for less than adequate remuneration, a benefit was conferred, a subsidy was deemed to exist, and, because the subsidized imports were found to be causing injury, the United States had the right to impose a countervailing duty equal to the amount of the benefit conferred. The fact that, at other times, Canadian provinces may have provided standing timber to these firms for adequate remuneration, and therefore no subsidy existed in those instances, is irrelevant. Those non-subsidies could neither eliminate nor diminish the benefits conferred when Canadian provinces provided stumpage for less than adequate remuneration.

17. Ultimately, Canada's position is based on a misreading of the SCM Agreement and the GATT 1994, a misunderstanding of prior panel and Appellate Body reports, and factual arguments that lack any foundation in logic. Accordingly, there simply is no basis to find that the USDOC's determination of the benefit of government-provided stumpage in New Brunswick and British Columbia is inconsistent with Articles 1.1(b), 14(d), 19.3, and 19.4 of the SCM Agreement, and Article VI:3 of the GATT 1994.

III. NOVA SCOTIA'S PRIVATE STUMPAGE SURVEY

18. We now turn to Canada's arguments regarding the Nova Scotia private stumpage survey. Put simply, Canada's argument is unsupported by anything other than speculation and it should be rejected for the reasons stated in the U.S. first written submission.[12] The USDOC explained that Nova Scotia has commissioned at least five surveys of private stumpage since 2000, in the normal course of business, and that Nova Scotia's Department of Natural Resources has a policy of setting Crown timber rates in the province to reflect negotiated private stumpage purchase prices, and that periodic surveys of Registered Buyers who routinely purchase stumpage assist Nova Scotia in implementing that policy.[13] Aside from Canada's unsubstantiated theories about changes to Nova Scotia's conduct of the survey, the record does not indicate an intent by Nova Scotia to conduct a survey for the purpose of submitting it in the USDOC's investigation.[14]

19. With regard to Canada's remaining arguments on this issue, we respectfully refer the Panel to the U.S. first written submission.[15]

IV. THE ALLEGED MARITIMES STUMPAGE BENCHMARK MEASURE

20. We turn finally to the alleged benchmark measure that Canada has sought to challenge. Canada's claim fails for a number of reasons. First, the so-called "Maritimes Stumpage Benchmark" is not susceptible to WTO dispute settlement as a measure of "present and continued application."[16] Second, the so-called "Maritimes Stumpage Benchmark" cannot be

[12] *See* U.S. First Written Submission, paras. 155-174.

[13] *See* GNS QR, p. 5 (Exhibit CAN-313).

[14] *See* U.S. First Written Submission, paras. 158-161.

[15] *See* U.S. First Written Submission, paras. 162-174.

[16] *See* Canada's First Written Submission, paras. 1184 and 1189-1200.

challenged as "ongoing conduct."[17] Third, and finally, even if the "Maritimes Stumpage Benchmark" were susceptible to WTO dispute settlement, Canada has not demonstrated that it would necessarily result in an inconsistency with Articles 1.1(b) or 14(d) of the SCM Agreement.[18]

21. Canada has not established that any measure exists, so it cannot be attributable to the United States. The United States does not contest that the USDOC made the determinations that were cited,[19] and that those determinations themselves are attributable to the United States. However, Canada has not established what it means to "treat[ ] Maritime stumpage prices as an in-market benchmark for [Alberta, Ontario, and Quebec]"[20] or that such "treat[ment]" is something that the USDOC is capable of doing. Neither Article 14(d) of the SCM Agreement nor the USDOC's determinations contemplate this concept of an "in-market" benchmark as Canada conceives it. Thus, the United States does not accept Canada's premise of "an in-market benchmark."[21] Moreover, Canada cannot establish that the alleged measure is attributable to the United States because Canada has not established that "treat[ment]" of "prices as an in-market benchmark" is a distinct action that can be taken in the first place.

22. Canada has also failed to establish the precise content of the alleged measure because Canada uses inconsistent descriptions of the content of the measure at different times and repeatedly qualifies its allegation with the phrase: "when faced with the relevant factual circumstances."[22] These allegations are insufficient to establish the precise content of the alleged measure.

23. Finally, Canada refers to a handful of determinations, but this does not establish present and continued application of the alleged measure. What is evident, rather, from the determinations that Canada cites, is that the USDOC has, on some occasions, decided to rely on evidence of stumpage prices from Nova Scotia or New Brunswick as a benchmark for stumpage provided by the government in countervailing duty proceedings involving stumpage in Canada. That is entirely appropriate given that the "starting point" of the analysis under Article 14(d) is private prices in the country of provision.[23] It is not surprising that the USDOC has used private Canadian prices to value stumpage in Canada when faced with the relevant factual circumstances that Canada describes.

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[17] *See* Canada's First Written Submission, paras. 1201-1205.

[18] *See* Canada's First Written Submission, paras. 1206-1208.

[19] *See* Canada's First Written Submission, Table 30.

[20] Canada's First Written Submission, para. 1190.

[21] Canada's First Written Submission, para. 1190.

[22] Canada's First Written Submission, para. 1196.

[23] *US – Carbon Steel (India) (AB)*, para. 4.154 ("the *primary* benchmark, and therefore the *starting point* of the analysis in determining a benchmark for the purposes of Article 14(d) of the SCM Agreement, is the prices at which the same or similar goods are sold by private suppliers in arm's-length transactions in the country of provision.") (italics in original). *See also US – Carbon Steel (India) (AB)*, para. 4.154 ("Proper benchmark prices would normally emanate from the market for the good in question in the country of provision.").

24. With respect to Canada's alternative argument regarding "ongoing conduct," Canada's claim fails because "ongoing conduct" is not a measure subject to dispute settlement and, even if it were, Canada has not demonstrated that "ongoing conduct" – as that concept has been elaborated in prior Appellate Body reports – exists in this situation.[24] We will not repeat our arguments on this point.

25. Ultimately, Canada's claim fails because Canada has not identified any inconsistency with Articles 1.1(b) or 14(d) of the SCM Agreement that would necessarily result from the so-called measure.

26. For all of the reasons the United States has given, Canada's claims against this so-called "Maritimes Stumpage Benchmark" fail and must be rejected.

V. CONCLUSION

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

[24] *See* U.S. First Written Submission, paras. 778-788.