UNITED STATES – COUNTERVAILING DUTY MEASURES ON SOFTWOOD LUMBER FROM CANADA

(DS533)

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

October 18, 2019

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Short Form	Full Citation
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

Madame Chairperson, members of the Panel:

1. In closing, the United States would like to make a few general comments once again about the standard of review and the proper analysis to be undertaken by a WTO dispute settlement panel when reviewing the determination of an investigating authority. It is important that we constantly remind ourselves what this proceeding is about.

2. It is especially important here, because Canada's approach to the underlying countervailing duty investigation and its approach to this panel proceeding carries with it a great risk that the Panel will be tempted down a path to error. Canada has chosen to overwhelm both the USDOC[1] and the Panel with the myriad complexities of forestry economics. It is a conscious decision by Canada to flood the record in an attempt to impermissibly shift the burden to the USDOC to identify every flaw with every piece of the self-selected and self-serving evidence that Canada itself chose to place on the record – no matter the relevance of that evidence to the fundamental question of whether a subsidy has been provided.

3. But the USDOC was not obligated to identify every flaw in every piece of evidence submitted by Canada. An investigating authority can provide a reasoned and adequate explanation without doing so. An investigating authority can weigh competing pieces of evidence and assign greater and lesser weight to those competing pieces of evidence without going into the kind of excruciating detail about all the potential flaws of certain pieces of evidence that Canada suggests is required. And under the SCM Agreement,[2] weighing evidence and coming to a conclusion about whether there is subsidization is the role of the investigating authority. That is what is under review here.

4. During this meeting, we have referred to the Appellate Body report in *US – Countervailing Duty Investigation on DRAMS*. That report contains a useful discussion of the correct analytical approach that panels should take when reviewing an investigating authority's determination that is based on the totality of the evidence. The Appellate Body acknowledged that it may make sense for a panel to look at each individual piece of evidence separately.[3] It is error, though, for a panel to examine whether each piece of evidence, viewed <u>in isolation</u>, demonstrates the ultimate proposition.[4] One particular piece of evidence, while not decisive, may take on greater meaning when viewed in the light of other corroborating evidence.[5]

5. The Appellate Body reasoned that, "if … an investigating authority relies on individual pieces of circumstantial evidence viewed together as support for a finding of entrustment or direction [and this would be just as true for a finding concerning the selection of a benchmark], a panel reviewing such a determination normally should consider that evidence in its totality,

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

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

[3] *See US – Countervailing Duty Investigation on DRAMS (AB)*, para. 145.

[4] *See US – Countervailing Duty Investigation on DRAMS (AB)*, paras. 146-150.

[5] *See US – Countervailing Duty Investigation on DRAMS (AB)*, para. 148.

rather than individually, in order to assess its probative value with respect to the agency's determination".[6]

6. The Appellate Body expressed concern that requiring that each piece of circumstantial evidence, on its own, establish the ultimate proposition effectively precludes an agency from making a finding on the basis of circumstantial evidence.[7] The Appellate Body explained that "[i]ndividual pieces of circumstantial evidence, by their very nature, are not likely to establish a proposition, unless and until viewed in conjunction with other pieces of evidence."[8] A panel needs to identify inferences drawn by the investigating authority and consider whether the evidence could sustain those inferences.[9]

7. "A proper assessment by the Panel, therefore, would have considered whether the individual piece of evidence being examined could tend to support – not establish in and of itself – the *particular intermediate factual conclusion* [and the Appellate Body italicized 'particular intermediate factual conclusion'] that the USDOC was seeking to draw from it. By looking instead to whether such evidence directly supported a finding of entrustment or direction [or the selection of a benchmark or another ultimate issue in the subsidy analysis], the Panel determined certain pieces of evidence not to be probative when, in fact, had they been properly viewed in the framework of the USDOC's examination, their relevance would not have been overlooked."[10]

8. Canada has pointed to the Appellate Body's observation in that report that errors in an investigating authority's consideration of individual pieces of evidence "undoubtedly would affect an examination of the *totality* of the evidence, as these pieces would constitute the evidence the Panel would consider as a whole in assessing the evidentiary support of the USDOC's finding".[11] The Appellate Body went on in the very next sentence to chide the panel, saying: "Nevertheless, what is absent from the Panel's 'global' assessment, in our view, is a consideration of the *inferences* that might reasonably have been drawn by the USDOC on the basis of the *totality* of the evidence."[12] Finally, the Appellate Body explained that "a piece of evidence that may initially appear to be of little or no probative value, when viewed in isolation, *could*, when placed beside another piece of evidence of the same nature, form part of an overall picture that gives rise to a reasonable inference" about the ultimate issue.[13]

9. Many of the Panel's questions during this meeting, and the earlier questions as well, ask about individual pieces of evidence. That is a practical approach for gathering information and argument from the parties and for understanding the many individual pieces of evidence that

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[6] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 150 (underline added).

[7] *See US – Countervailing Duty Investigation on DRAMS (AB)*, para. 150.

[8] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 150.

[9] *See US – Countervailing Duty Investigation on DRAMS (AB)*, para. 151.

[10] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 152 (italics in original; underline added).

[11] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 154 (italics in original).

[12] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 154 (italics in original).

[13] *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 154 (italics in original).

were on the USDOC's record, as the Appellate Body noted. Regrettably, Canada seizes every opportunity to attack each individual piece of evidence as failing, on its own, to establish the ultimate proposition. And Canada argues that, therefore, each individual piece of evidence has no value at all.

10. Canada's head of delegation said the other day that "zero plus zero = zero". And he just said it again in Canada's closing statement. That's a good line. It's the kind of line that could stick in a panelist's head. But that plainly is not the correct analytical approach described by the Appellate Body in *US – Countervailing Duty Investigation of DRAMS*. Because, what the Panel needs to do is assess what relevance the USDOC assigned to each piece of evidence? What intermediate conclusion did the USDOC find that the evidence tended to support? How did the USDOC view multiple pieces of evidence when taken together, as explained in the USDOC's determination?

11. And where the USDOC had before it multiple pieces of evidence, it was necessary for the USDOC to assign different weights to those pieces of evidence. The Panel's role is to assess whether the USDOC provided a reasoned and adequate explanation for its choices, and whether those choices could have been made by an unbiased an objective investigating authority looking at the same evidence. When presented with competing evidence – some of which was prepared for the purpose of the investigation on behalf of interested parties to the investigation, and some of which was independently prepared in the ordinary course of business outside the context of the investigation – and faced with the time constraints for investigations imposed by the SCM Agreement as well as the massive volume of evidence imposed on the USDOC by Canada, the question for the Panel is whether the choices the USDOC made in weighing the evidence were reasonable?

12. The United States thinks that the answer to that question absolutely is yes, and it is not a close call.

13. Canada, of course, disagrees. Forcefully. Yesterday, we heard Canada's head of delegation, in reaction to an intervention by the United States, call the notion that the USDOC would investigate allegations that Canada and its provinces provide injurious subsidies to the Canadian softwood lumber industry "ridiculous." And this morning, he again called them "frankly ridiculous duties".

14. These are astonishing statements. Canada, itself, is an active user of trade remedies. The covered agreements provide that Members have the right to apply trade remedies in response to injurious dumping and subsidization. Allegations of unfair trade practices are not "ridiculous." They are to be taken seriously, and that is what the USDOC did in the underlying investigation.

15. In response to an application and supporting evidence filed by representatives of the U.S. softwood lumber industry, the USDOC acted appropriately in initiating a countervailing duty investigation. So charged, and notwithstanding the timing constraints imposed by the SCM Agreement, the USDOC conducted a thorough and diligent investigation, issuing scores of questionnaires, collecting thousands upon thousands of pages of factual information, staging nearly a dozen *in situ* verifications, considering hundreds of pages of written argument from the

parties along with oral argument, all culminating in a final determination in excess of 300 single-spaced pages, in which the USDOC analyzed the evidence, addressed comments from interested parties, and provided a reasoned and adequate explanation for its determination.

16. Despite the immense amount of effort undertaken by the USDOC and the extensive explanations that the USDOC provided for its determination, it has become apparent during the course of this dispute, after hundreds of pages of argument thus far and six days of hearings, that nothing would ever be good enough for Canada, short of finding there to be no countervailable subsidies at all.

17. Canada simply does not believe that it should be held accountable for the injurious subsidies its governments provide to softwood lumber producers. But it is worth keeping in mind that Canada's foreign ministry has within it a whole Softwood Lumber Division, and within that there is a Softwood Lumber Litigation Division. The softwood lumber industry is of tremendous importance to Canada's economy, and it employs a lot of people. Just intuitively, it would be political malpractice if the governments in Canada did not provide support to Canada's softwood lumber industry. A host of elected officials would be voted out of office immediately. Yet Canada asks the Panel to believe that Canada and its provinces have provided no subsidies at all to the softwood lumber industry, and the USDOC just made it all up. That truly is "ridiculous".

18. The more credible conclusion, and the conclusion that the Panel should reach after properly reviewing the USDOC's determination, is that there is ample support in the record evidence for the USDOC's findings of subsidization, and an unbiased and objective investigating authority absolutely could have made the same findings that the USDOC made.

19. Madame Chairperson, members of the Panel, this concludes the U.S. closing statement. The United States once again thanks the Panel and the Secretariat staff assisting you for your continued hard work on this dispute.