Canada – Measures Concerning Trade in Commercial Aircraft

(DS522)

THIRD-PARTY SUBMISSION OF THE UNITED STATES OF AMERICA

June 14, 2019

TABLE OF REPORTS

Title	Full Title and Citation
Canada – Aircraft (AB)	Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999
Canada – Renewable Energy (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
Canada – Renewable Energy (Panel)	Panel Reports, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-in Tariff Program*, WT/DS412/R, adopted 24 May 2013, as modified by Appellate Body Reports WT/DS412/AB/R / WT/DS426/AB/R
EC – Large Civil Aircraft (AB)	Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/AB/R, adopted 1 June 2011
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
US – Large Civil Aircraft (AB)	Appellate Body Report, *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WT/DS353/AB/R, adopted 23 March 2012

1. The United States welcomes the opportunity to provide its views in this dispute. In this submission, the United States will comment on the legal operation of Articles 1 and 14 of the *Agreement on Subsidies and Countervailing Measures* (the "SCM Agreement"). In particular, the United States will address these Articles as they relate to the alleged subsidies provided by Canada for the launch of the C-Series Aircraft, referred to as "launch aid" by Brazil and "repayable contributions" by Canada. The United States refers to these alleged subsidies as "LA/RC."

2. The parties present two opposing views as to the proper label for LA/RC, which they consider determinative for the assessment of benefit in light of the guidelines in Article 14 of the SCM Agreement. Brazil argues primarily that because LA/RC are equity infusions, Article 14(a) is the applicable guideline in establishing a benefit benchmark.[1] Canada argues that LA/RC are loans and, therefore, Article 14(b) is the applicable guideline.[2] However, the four sub-sections in Article 14 provide "guidelines" for "Calculation of the Amount of a Subsidy in Terms of the Benefit to the Recipient," and Article 14 in no way indicates that the principles in these subsections are mutually exclusive.

3. Articles 1 and 14 of the SCM Agreement are located in two separate parts of the Agreement, but Article 14 provides context as to the operation of Article 1. Article 1, appearing in Part I "General Provisions," defines a subsidy as existing where there is a financial contribution by a government or public body (Article 1.1(a)) and a "benefit is thereby conferred" (Article 1.1(b)).[3] Article 14, appearing in Part V on "Countervailing Measures," provides guidelines for methods used to determine the amount of countervailing measures, but these guidelines also serve as relevant context to the assessment of an alleged subsidy's benefit component (Article 1.1(b)).[4]

---

[1] Brazil First Written Submission, paras. 152, 210, 251. The United States recognizes that Brazil argues, in the alternative, that the LA/RC are loans and Article 14(b) applies. Brazil First Written Submission, paras. 92, 119.

Article 14(a) states:

> "government provision of equity capital shall not be considered as conferring a benefit, unless the investment decision can be regarded as inconsistent with the usual investment practice (including for the provision of risk capital) of private investors in the territory of that Member."

[2] Canada First Written Submission, paras. 188, 189.

Article 14(b) states:

> "a loan by a government shall not be considered as conferring a benefit, unless there is a difference between the amount that the firm receiving the loan pays on the government loan and the amount the firm would pay on a comparable commercial loan which the firm could actually obtain on the market. In this case the benefit shall be the difference between these two amounts."

[3] Although Article 1 also provides that a subsidy shall exist "if there is any form of income or price support in the sense of Article XVI of GATT 1994" and a "benefit is thereby conferred," neither party argues that this is relevant to the measures at issue here.

[4] *See Canada – Aircraft (AB)*, para. 155 ("Although the opening words of Article 14 state that the guidelines it establishes apply "{f}or the purposes of Part V" of the SCM Agreement, which relates to

4. In determining whether the measure at issue is a subsidy, a panel's first task is to determine whether the measure is a financial contribution as provided in Article 1.1(a)(1). Identifying a measure's characteristics[5] (for example, the flow of financing from a source to a recipient, any repayments, the duration of the financial relationship, etc.) does not necessarily mean labeling or identifying the measure as a particular type of instrument. Instead, it is a step to identify the central characteristics or features of the measure that can serve as the basis to determine whether a financial contribution exists.[6] Additionally, while "the classification of a transaction under municipal law may inform a panel's assessment, it is not 'determinative.'"[7] Therefore, even if a measure is explicitly recognized in a Member's municipal law as a particular type of financial instrument, such as an equity infusion or loan, the panel still should identify the relevant characteristics of that instrument. The characteristics of the instrument inform the evaluation of whether that instrument qualifies as a "financial contribution" for purposes of Article 1.1(a)(1).

5. After determining that a measure qualifies as a financial contribution, a panel must assess whether a "benefit is thereby conferred." The ordinary meaning of "benefit" is "an advantage or profit gained from something"; accordingly, this exercise considers whether the financial contribution has provided an advantage or made "the recipient 'better off' than it would otherwise have been, absent that contribution."[8] The guidelines in Article 14 refer to the market or market terms for purposes of evaluating the benefit.[9] Thus, the commercial marketplace provides the appropriate basis or benchmark for comparing whether a benefit has been conferred by the financial contribution.[10]

"countervailing measures", our view is that Article 14, nonetheless, constitutes relevant context for the interpretation of "benefit" in Article 1.1(b).")

[5] *US – Large Civil Aircraft (AB)*, para. 589. *See also Canada – Renewable Energy (Panel)*, para. 7.194.

[6] *Canada – Renewable Energy (Panel)*, para. 7.194 (citing *China – Auto Parts*, para. 171).

[7] *Canada – Renewable Energy (Panel)*, para. 7.194 (citing *China – Auto Parts*, para. 171); *see also Canada – Renewable Energy (AB)*, para. 5.127.

[8] *US – Large Civil Aircraft (AB)*, para. 662 (quoting *Canada – Aircraft (AB)*, para. 157).

[9] *See* SCM Agreement Article 14(a) (usual investment practice of private investors), 14(b) (comparable commercial loan which the firm could actually obtain on the market), 14(c) (comparable commercial loan absent the government guarantee), 14(d) (prevailing market conditions for the good or service in question).

[10] *US – Large Civil Aircraft (AB)*, para. 662 (citing *Canada – Aircraft (AB)*, para. 157).

The United States notes that Canada did not accurately summarize the reasoning by the panel in *EC – Large Civil Aircraft*. Canada states,

> The panel in *EC and certain member States – Large Civil Aircraft* undertook its analysis of the financial contribution in a similar manner when presented with arguments that a particular instrument should be characterized as a debt instrument, or an equity instrument. The panel in that case made a determination with respect to which type of instrument the measure should be characterized as under Article 1.1(a)(1)(i) – in that case a loan – on the basis of the risks

6. Article 14 provides relevant context as to the formulation of this benchmark. Articles 14(a) through (c) provide context if the measure is a direct transfer of funds, and Article 14(d) provides context if the measure is a government provision of goods or services, or purchase of goods. The method applied by a Member's investigating authorities for purposes of countervailing duties shall be consistent with these guidelines,[11] and they serve as context for a panel's analysis of the "benefit" element in Article 1.1(b).[12] Practically speaking, the guidelines in Article 14 may help inform identification of the benchmark in light of the measure's characteristics.

7. A measure's characteristics have inherent implications for the benchmark as to whether a benefit exists, and this is especially relevant with respect to the context afforded by Article 14. However, the text in Article 1.1(b) remains paramount. The underlying principle and focus of a "benefit" analysis for purposes of Article 1.1(b) remains whether the recipient is provided an advantage or made "better off" than it would otherwise have been, and not whether a benefit is revealed through application of the Article 14 guidelines. As noted by the Appellate Body in *Canada – Renewable Energy*:

> {T}he characterization of a transaction under Article 1.1(a) of the SCM Agreement may have implications for the manner in which the assessment of whether a benefit is conferred is to be conducted. For instance, the context provided by Article 14 of the SCM Agreement presents different methods for calculating the amount of a subsidy in terms of benefit to the recipient depending on the type of financial contribution at issue. However, although different characterizations of a measure may lead to different methods for determining whether a benefit has been conferred, the issue to be resolved under Article 1.1(b) remains to ascertain whether a 'financial contribution' or 'any form of income or price support' has conferred a benefit to the recipient.[13]

8. Article 14 also does not preclude the possibility that the methods used to assess benefit may involve the principles of more than one of its guidelines. The guidelines in Article 14 are not mutually exclusive or conflicting. This is consistent with the idea that a transaction can be

---

> associated with the particular instrument and the greater similarity of its characteristics with a loan rather than equity . . . .

Canada First Written Submission, para. 169 (citing *EC – Large Civil Aircraft (Panel)*, paras. 7.435-7.461). As stated above, identifying the characteristic of a measure does not mean labeling the measure as a particular type of instrument, and the panel's task is to determine whether the measure falls within the scope of a financial contribution in light of its characteristics. Furthermore, the panel in the particular paragraphs cited by Canada had already made the determination of financial contribution and was discussing the appropriate benchmark to be adopted in light of the financial instrument's risk-sharing features. *See EC – Large Civil Aircraft (Panel)*, paras. 7.435-7.461 (making findings on the project-specific risk premiums proposed by the United States and the EU).

[11] The chapeau of Article 14 states, "{A}ny such methods *shall be consistent* with the following guidelines . . . ." (emphasis added).

[12] *Canada – Large Civil Aircraft (AB)*, para. 155; *EC – Large Civil Aircraft (AB)*, para. 833.

[13] *Canada Renewably Energy (AB)*, para. 5.130.

characterized as falling under more than one type of financial contribution as provided in Article 1.1(a)(1). Specifically, the Appellate Body in *Canada – Renewable Energy* noted that

> {}transactions may be complex and multifaceted. This may mean that different aspects of the same transaction may fall under different types of financial contribution. It may also be the case that the characterization exercise 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.[14]

Therefore, a benchmark to assess whether a benefit is conferred by "complex and multifaceted" instruments could easily incorporate the principles of more than one of the guidelines provided in Article 14.

9. This is indeed possible as a practical matter with respect to the type of measures that are similar to LA/RC. In *EC – Large Civil Aircraft*, the panel and Appellate Body recognized that while "launch aid/member state financing" was generally conceived as a loan, these measures have "equity-like qualities" that "distinguished them from a conventional loan."[15] The panel and Appellate Body then adopted a framework similar to an investment decision by using a benchmark based on the "rate of return" that a private entity would seek,[16] which in principle is more akin to Article 14(a) than Article 14(b).

10. Although the Appellate Body found that the panel had made inconsistent statements with respect to the applicability of venture capital-derived benchmarks,[17] neither the panel nor the Appellate Body precluded the possibility of deriving a benchmark from a combination of both venture capital investment risk portfolios and commercial borrowing rates.[18] The Appellate Body especially recognized that during the early developmental stages of an aircraft, the manufacturer would have been most similar to firms that are "'small and young'" and "'plagued by high levels of uncertainty,'" which are typical of firms that receive venture capital financing, and venture capitalists "finance these high-risk, potentially high-reward projects, {by}purchasing equity or equity-linked stakes . . . ."[19]

11. Hence, if the Panel finds that the LA/RC involves a financial contribution falling within the scope of Article 1.1(a)(1), it need not limit itself to label the transactions as either equity

---

[14] *Canada – Renewable Energy (AB)*, para. 5.120 (discussing the similar scenario where a transaction fell under more than one type of financial contribution in *US – Large Civil Aircraft*).

[15] *EC – Large Civil Aircraft (AB)*, para. 827 (sharing the same view as the panel report).

[16] *EC – Large Civil Aircraft (AB)*, para. 836.

[17] *EC – Large Civil Aircraft (AB)*, paras. 888-985.

[18] *EC – Large Civil Aircraft (AB)*, para. 887 (agreeing with the panel that project-specific risk premiums derived from venture capital risk investment risk portfolios may be applicable to the launch aid / member State financing measures).

[19] *EC – Large Civil Aircraft (AB)*, para. 888; *see also EC – Large Civil Aircraft (Panel)*, para. 7.463.

infusions or loans for purposes of establishing a benchmark. Furthermore, even if the Panel generally conceives of LA/RC as a loan, the Panel may still construct a benchmark that borrows principles from the other guidelines of Article 14 if appropriate to do so. Therefore, although Brazil and Canada each advocate a (different) characterization corresponding to a single sub-section of the guidelines in Article 14, the Panel may go beyond the binary option of loan versus equity infusion and adopt elements of both to the extent necessary to reflect the relevant characteristics of the financial contribution.