United States – Countervailing Duty Measures on Softwood Lumber from Canada

(DS533)

Third Party Oral Statement by the European Union

Geneva, 28 February 2019
Ms. Chairwoman, Distinguished Members of the Panel,

1. In this Oral Statement we would like to address a few selected issues that the EU did not touch upon in its written submission.

I. SETTING TO ZERO THE RESULTS OF CERTAIN COMPARISONS IN THE BENEFIT ANALYSIS

2. The EU would like to comment on the USDOC’s method of “setting to zero” certain comparisons in the context of its benefit analysis. Canada seems to make two allegations under this heading. First, Canada argues that the USDOC made an “apples-to-oranges” comparison by comparing individual transaction prices which relate to certain specific market conditions as regards for example price, quality, harvesting, geographic and other conditions of types of lumber with average monthly and annual benchmark prices that necessarily reflect a wider range of such conditions.1 Second, Canada considers that the USDOC could not set to zero those transaction values that exceeded the benchmark as this methodology was unreasonable and inconsistent with Articles 1.1(b), 14(d), 19.3 and 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994.2

3. Regarding the first point, the Parties seem to agree that a comparison of individual transactions with a benchmark that is based on a weighted average may, as a matter of principle, be permissible.3 The EU agrees. What matters, as confirmed by the Appellate Body is that the selection of the appropriate benchmark should ensure a “meaningful comparison for the determination of benefit”.4 The selection of the appropriate benchmark may depend on the circumstances of the case.

4. The Appellate Body has established that an investigating authority has a certain degree of discretion regarding the method it uses to calculate benefit. This is reflected in the terms “guidelines” and ”any method” in Article 14.5 No one specific methodology is required.6 The methodology of calculating benefit must be

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1 Canada’s first written submission, paras. 929-930.
2 Canada’s first written submission, para. 935.
3 Canada’s first written submission, para. 930; United States’ first written submission, para. 522.
reasonable.\(^7\) In comparing a particular price with a benchmark under the SCM Agreement, in order for the result of the comparison to be meaningful, the guiding principle is that like must be compared with like, due adjustment being made where necessary, unless there is a justification for doing otherwise. Accordingly, the terms and conditions of the price should in principle be comparable to those of the benchmark.

5. Regarding Canada’s second argument, the EU considers that none of the provisions cited to by Canada imposes the obligation on an investigating authority to offset positive benefit amounts, i.e. transactions below the benchmark, against negative benefit amounts, i.e. transactions above the benchmark. The EU agrees with the United States that there is no general requirement under the SCM Agreement to provide “credits” for those transactions in which no benefit is conferred.\(^8\) Simply put, there would not be any subsidisation with regard to those transactions.

6. The panel explicitly rejected a similar argument advanced by China in *US – Anti-Dumping and Countervailing Duties (China)*.\(^9\) The panel pointed to the wording in Article 14(d) which stipulates that “the provision of goods by a government shall not be considered as conferring a benefit, unless it is made for less than adequate remuneration.” This wording indicates that where the provision of a good is made for adequate remuneration, it shall not be considered for the purpose of calculating benefit.\(^10\) [emphasis added] Or, in other words, the benefit is zero. The panel also argued that there was no reason why the requirement to “offset”, if accepted, could not also be invoked across different types of subsidies even though such a requirement would run counter the basic principle that each subsidy must be analysed and assessed independently.\(^11\) The EU agrees. The fact that benefit is not conferred in certain transactions does not mitigate the fact that a benefit was conferred in other transactions; nor does it “reduce” the benefit in those transactions. An investigating authority, when reviewing a given “universe” of

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\(^7\) Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.213.

\(^8\) United States’ first written submission, para. 474.

\(^9\) Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 11.50.

\(^10\) Panel Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 11.47.

transactions, is concerned with those transactions where a benefit is conferred. It may in principle disregard the other transactions.

7. However, the EU re-emphasizes the need to select a benchmark that permits a “meaningful” comparison as stipulated by the Appellate Body.

II. The Relevant Market for the Determination of Benefit in Renewable Energy Purchases

8. The EU will also briefly comment on the determination of benefit with respect to governmental purchases of electricity from renewable sources. This dispute raises two issues: the definition of the relevant market, and the selection of benchmarks. The EU will restrict its comments to market definition which, as the Appellate Body found, is the first step of the benefit analysis.\(^{12}\)

9. In cases where an earlier dispute dealt with analogous factual and legal issues, panels and the Appellate Body focused their analysis on whether the two disputes can be distinguished, or in other words: whether any differences would justify a different conclusion,\(^{13}\) or whether there are other important reasons to depart from the earlier decision. Such an approach is helpful analytically, and it helps to ensure consistency in the case law.

10. It is also an approach within the Panel’s reach in this dispute. The Panel could simply compare the circumstances of Canada - FIT to the circumstances of this dispute, and ask whether there are important differences which might lead it to make different findings.

11. In Canada - FIT, the Appellate Body found that a benefit comparison for governmental purchases of electricity from renewable sources should be done “within competitive markets” for electricity from renewable courses, and not within a “single market for electricity generated from all sources of energy”.\(^{14}\) This is because the government’s “regulatory intervention”,\(^{15}\) notably its “choice of

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\(^{12}\) Appellate Body Report, Canada – Renewable Energy / Canada — Feed-In Tariff Program, para. 5.169.

\(^{13}\) See, for example, Appellate Body Report, India-Solar Cells, paras. 5.16 and 5.25-5.39.

\(^{14}\) Appellate Body Report, Canada – Renewable Energy / Canada — Feed-In Tariff Program, para. 5.178.

\(^{15}\) Canada – Renewable Energy / Canada — Feed-In Tariff Program Para. 5.173.
supply mix of electricity generation”\textsuperscript{16}, created a market that otherwise would not exist. According to the Appellate Body, such a “creation of the market” cannot be considered to give rise to subsidies in and of itself.\textsuperscript{17}

12. In this dispute, the transactions allegedly giving rise to subsidies were governmental purchases of electricity from renewable sources (biomass). The transactions used as a benchmark were sales of electricity from all sources. At first sight, this appears to be an analogous situation, calling for the same conclusion as in \textit{Canada - FIT}.

13. The Panel should, however, consider any relevant differences that have been alleged.

14. For example, the United States points out the fact that the public utilities buy (biomass) electricity from, and sell electricity (from all sources) to the same respondent companies. According to the United States, this shows that the benchmark price reflects “arm’s length transactions between independent buyers and sellers”.\textsuperscript{18} However, whether buyers and sellers are independent and whether transactions are at arm’s length does not appear to concern the definition of the relevant product market. Also, the fact that the same two entities are engaged in certain transactions does not, in itself, tell us anything about whether those transactions occur in the same market.

15. The United States also argues that the public utilities and respondent companies considered different types of electricity to be “the same” or “substitutable”, and that this shows that USDOC considered both the demand-side and the supply-side of the market,\textsuperscript{19} unlike the panel in \textit{Canada-FIT}. However, the Appellate Body’s statements on the need to look at the supply-side of the market did not concern the views of various market participants on the substitutability of electricity. They also did not concern whether or not the same companies happened to both buy and sell

\textsuperscript{16} \textit{Canada – Renewable Energy / Canada — Feed-In Tariff Program} Para. 5.178.
\textsuperscript{17} \textit{Canada – Renewable Energy / Canada — Feed-In Tariff Program} Para. 5.188.
\textsuperscript{18} United States’ first written submission, para. 682.
\textsuperscript{19} United States’ first written submission, para. 683.
electricity. They concerned the costs and characteristics of renewable energy, and even more fundamentally, the governmental definition of the energy supply-mix.20

16. Third, it has also been suggested that this dispute should be distinguished from Canada – FIT because it concerns countervailing duties, and not serious prejudice claims21 (or, presumably, prohibited subsidy claims). It is not clear what role this difference should play in the determination of the relevant market, which is part of the determination of benefit. Article 14(d) explicitly applies “for the purposes of Part V” of the SCM Agreement. Nevertheless, the Appellate Body has repeatedly held, including in Canada – FIT, that Article 14(d) is relevant context for the interpretation of “benefit” in Article 1.1(b).22 It also held that the “explicit textual reference to Article 1.1 in Article 14 indicates … that "benefit" is used in the same sense” in the two provisions.23 Finally, the fact that the Appellate Body’s analysis of benefit in Canada – FIT relied to a large extent on Article 14(d) suggests that its findings can be transposed to the context of countervailing duties.

III. CONCLUSION

Ms. Chairwoman, distinguished Members of the Panel, we thank you for your attention and look forward to answering your questions.

20 See, in particular, Canada – Renewable Energy / Canada — Feed-In Tariff Program para. 5.172. “Had the Panel undertaken an analysis of demand-side and supply-side factors, and in particular supply-side factors, the significance of government intervention in the electricity market to the definition”

21 Japan’s third party written submission, paras. 23 (“In Canada – Renewable Energy/ Canada – Feed-in Tariff Program, the Appellate Body held, in the context of addressing serious prejudice claim rather than examining the WTO-consistency of countervailing duties […]”) and 25 (“Japan believes that where certain subsidies have positive effects not only on the recipients, but also on any private entity in the relevant industry (for example, subsidies to promote research and development), such subsidies may be found not to cause serious prejudice depending on factual circumstances including their “nature”, while those subsidies can be subject to countervailing duty measures.”)


23 Appellate Body Report, Canada – Aircraft, para. 155.