

Canada has not established that (a) the Maritimes Stumpage Benchmark is a measure that has had repeated and uninterrupted application over an extended period of time; (b) the uninterrupted application of the measure has continued despite differences in the facts underlying a proceeding; or (c) the USDOC's consistent reference to precedents from previous determinations where the Maritimes Stumpage Benchmark was applied shows that this measure is likely to continue in future. Therefore, for the same reasons, we conclude that Canada has also not established the likelihood of continuation of the conduct, i.e. likelihood of continued application of the Maritimes Stumpage Benchmark.

7.779. Based on the above, we find that Canada has not established the existence of the Maritimes Stumpage Benchmark as ongoing conduct.<sup>1546</sup>

#### 7.13.4 Conclusion

7.780. In light of the foregoing, we find that Canada has failed to demonstrate that the Maritimes Stumpage Benchmark exists, either as a measure of present and continued application or ongoing conduct. We find that the evidence relied upon by Canada does not support its description of the content of this measure, and also does not support its view that irrespective of the evidence the USDOC concludes in its determinations that a benchmark in the Maritime Provinces is comparable to Alberta, Ontario, or Québec. In addition, we consider that the evidence presented by Canada does not show that a Maritimes Stumpage Benchmark is being currently applied or will continue to be applied in the future.

7.781. In relation to Canada's claim in the alternative, that the Maritimes Stumpage Benchmark is a measure of ongoing conduct, we consider that Canada has not established either the repeated application of the conduct, or the likelihood that such conduct would continue.

7.782. Because we find that Canada has not demonstrated the existence of the measure, we do not consider it necessary to separately examine whether the alleged measure is WTO-consistent.

## 8 CONCLUSIONS AND RECOMMENDATION

8.1. For the reasons set out in this Report, we conclude as follows:

- a. The USDOC acted inconsistently with Article 14(d) of the SCM Agreement by improperly rejecting the proposed private stumpage and log prices in Ontario as a valid stumpage benchmark to determine the adequacy of remuneration for Crown timber provided to the respondent companies by the province.

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<sup>1546</sup> In reaching this conclusion we note that a measure has been found to be ongoing conduct in three WTO cases, *US – Continued Zeroing*, *US – Orange Juice (Brazil)*, and *US – Supercalendered Paper*. We consider that the present case is distinguishable from the facts in all of these three disputes. In both *US – Continued Zeroing* and in *US – Orange Juice (Brazil)* the issue was continued use of the same "zeroing methodology". Here, however, Canada has not shown the existence of the same methodology. In particular, as discussed above, the specific benchmark used by the USDOC differs across the determinations relied upon by Canada. In addition, in *US – Orange Juice (Brazil)* the panel concluded that Brazil had established the existence of the USDOC's continued use of zeroing procedures as a "measure" in the form of "ongoing conduct" under the orange juice anti-dumping duty order. In support of this view, the panel relied on the following evidence (a) a computer programme used by the USDOC that was instructed to use zeroing; (b) evidence from the USDOC's determination where it stated that US domestic law defines "dumping margin" as the "amount by which the normal value exceeds the export price or constructed export price of the subject merchandise", and that outside the context of anti-dumping investigations involving the W-W methodology, the USDOC interprets this statutory definition to mean that a dumping margin exists only when normal value is greater than the export price of constructed export price. (Panel Report, *US – Orange Juice (Brazil)*, paras. 7.191-7.192). Here, however, Canada does not show that the USDOC interprets the statutory obligation to use an in-country benchmark to mean that whenever it assesses the adequacy of remuneration of standing timber provided by the Canadian provinces of Alberta, Ontario, or Québec it will use a benchmark based on private transactions from the maritime provinces. As regards the panel and Appellate Body report in *US – Supercalendered Paper*, as noted in fn 1526 above, unlike the present case, the panel found that the substance of the questions and the USDOC's conduct remained the same across the relevant determinations. Here, however, we consider that the USDOC's conduct is not the same, and as noted above, is driven by (a) the requirement to use a benchmark based on transactions in the country of provision; and (b) the underlying facts and circumstances of the case.

- b. The USDOC acted inconsistently with Article 14(d) of the SCM Agreement by improperly rejecting the proposed BCTS auction prices in British Columbia as a valid stumpage benchmark to determine the adequacy of remuneration for Crown timber provided to the respondent companies by the province.
- c. The USDOC acted inconsistently with Article 14(d) of the SCM Agreement by improperly rejecting the proposed auction stumpage prices in Québec as a valid stumpage benchmark to determine the adequacy of remuneration for Crown timber provided to the respondent companies by the province.
- d. The USDOC acted inconsistently with Article 14(d) of the SCM Agreement by improperly rejecting the proposed TDA log prices in Alberta as a valid stumpage benchmark to determine the adequacy of remuneration for Crown timber provided to the respondent companies by the province.
- e. The USDOC acted inconsistently with Article 14(d) of the SCM Agreement by erroneously finding that the Nova Scotia benchmark price reasonably reflected the prevailing market conditions in Alberta, Ontario, and Québec, and by failing to make the necessary adjustments to the Nova Scotia benchmark price, such that the benchmark price related or referred to the prevailing market conditions in the market where the good was provided.
- f. The USDOC acted inconsistently with the *chapeau* of Article 14 of the SCM Agreement by using the unreliable Nova Scotia survey for calculating the benchmark price to determine the adequacy of remuneration for Crown timber provided to respondent companies by Alberta, Ontario, and Québec.
- g. The USDOC acted inconsistently with Article 14(d) of the SCM Agreement by failing to consider the full remuneration paid by respondent companies in Alberta, Ontario, Québec, and New Brunswick in determining the adequacy of remuneration for Crown timber provided to the respondent companies by these provinces.
- h. With respect to Canada's claims under Article 14(d) of the SCM Agreement concerning the USDOC's use of the Washington State log price benchmark for determining the adequacy of remuneration for Crown timber provided by British Columbia:
  - i. The USDOC acted inconsistently with Article 14(d) of the SCM Agreement because it failed to adjust its benchmark on account of the (1) conversion factors used in British Columbia, (2) utility-grade and beetle-killed logs in the harvest of the Canadian respondents.
  - ii. The USDOC acted inconsistently with Article 14(d) of the SCM Agreement because it did not have proper basis to conclude that stand-as-a-whole pricing was not a prevailing market condition in British Columbia, and thus had no basis to not take this condition into account when adjusting its benchmark to reflect the prevailing market conditions in British Columbia.
  - iii. Canada has not established that the Washington State log price benchmark was *per se* inconsistent with Article 14(d), i.e. irrespective of adjustments to the benchmark, because of the differences in market conditions between Washington State and British Columbia.
  - iv. Canada has not established that the USDOC acted inconsistently with Article 14(d) of the SCM Agreement because it did not adjust its benchmark on account of the higher transportation costs incurred by the Canadian respondents, compared to producers in eastside Washington to bring their lumber to their primary US markets.
- i. The USDOC acted inconsistently with Article 14(d) of the SCM Agreement by improperly setting-to-zero the results of certain comparisons between the prices of examined transactions and the benchmark price in determining the adequacy of remuneration for Crown timber provided to respondent companies by New Brunswick and British Columbia.

- j. The USDOC acted inconsistently with Article 1.1(a)(1)(iv) of the SCM Agreement by determining that the export-permitting process for British Columbia logs was a financial contribution in the form of government direction or entrustment to provide goods.
- k. The USDOC acted inconsistently with Article 1.1(a)(1)(i) of the SCM Agreement by characterizing the reimbursements provided by New Brunswick to JDIL, and by Québec to Resolute, as financial contributions in the form of grants. Consequently, the USDOC's benefit findings in respect of these reimbursements were inconsistent with Article 1.1(b) of the SCM Agreement.
- l. The USDOC acted inconsistently with Articles 1.1(b) and 14(d) of the SCM Agreement by using a benchmark that did not relate to the prevailing market conditions within the market where BC Hydro purchased biomass electricity from West Fraser and Tolko, and therefore incorrectly determined if a benefit was conferred. We decline to rule on Canada's claim that the USDOC improperly rejected the alternative benchmarks submitted by the interested parties as Canada has failed to make a *prima facie* case in that regard.
- m. The USDOC acted inconsistently with Article 1.1(b) of the SCM Agreement with respect to the turn-down payments that BC Hydro made to Tolko by failing to assess whether a benefit was conferred consistently with Article 1.1(b). The USDOC acted inconsistently with the first sentence of Article 14(d) in that it failed to assess whether the purchase of goods was made for more than adequate remuneration.
- n. The USDOC acted inconsistently with Articles 1.1(b) and 14(d) of the SCM Agreement by using a benchmark that did not relate to the prevailing market conditions within the market where Hydro-Québec purchased biomass electricity from Resolute and therefore incorrectly determined if a benefit was conferred.
- o. The USDOC acted inconsistently with Articles 1.1(b) and 14(d) of the SCM Agreement by improperly rejecting the Merrimack Study as a benchmark to assess if Hydro-Québec's purchases of electricity from Resolute conferred a benefit.
- p. The USDOC erred by characterising the LIREPP as a financial contribution to Irving through NB Power in the form of revenue foregone, rather than a purchase of goods consistent with Article 1.1(a)(1)(iii), and as a result, failed to properly assess the alleged benefit to the Irving Group in accordance with Article 1.1(b) and the first sentence of Article 14(d) of the SCM Agreement.
- q. Canada has not established that the USDOC acted inconsistently with Articles 2.1(a) and (b) of the SCM Agreement in concluding that the ACCA for Class 29 assets was *de jure* specific.
- r. Canada has not demonstrated the existence of a "Maritimes Stumpage Benchmark" as a measure of present and continued application, or as ongoing conduct, and therefore we do not need to address Canada's claims under Articles 1.1(b) and 14(d) of the SCM Agreement challenging the Maritimes Stumpage Benchmark.

8.2. We exercise judicial economy with respect to the following claims:

- a. Canada's claim that the USDOC acted inconsistently with Articles 1.1(b), 19.3, and 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 by improperly setting-to-zero the results of certain comparisons between the prices of examined transactions and the benchmark price, in determining the adequacy of remuneration for Crown timber provided to respondent companies by New Brunswick and British Columbia.
- b. Canada's claim that the USDOC acted inconsistently with Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 by relying on the unreliable Nova Scotia survey for calculating the benchmark price to determine the adequacy of remuneration for Crown timber provided to respondent companies by Alberta, Ontario, and Québec.

- c. Canada's claims under Articles 11.2 and 11.3 of the SCM Agreement regarding the USDOC's initiation of an investigation against the export-permitting process for British Columbia logs, in light of the finding set out in paragraph 8.1(j) above.
- d. Canada's claims under Articles 10, 19.1, 19.3, and 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 concerning the USDOC's attribution of certain alleged subsidies to the production of softwood lumber products, and therefore the USDOC's failure to ascertain the precise amount of subsidies attributable to the product under investigation.

8.3. For the procedural reasons set out in this Report, we decline to rule on Canada's claim under Article 14(d) of the SCM Agreement in respect of the USDOC's use of Irving's purchases of Nova Scotia private timber as a stumpage benchmark for determining the adequacy of remuneration for Crown timber provided by New Brunswick. Considering that Canada did not properly make out that claim, we have no basis to conclude that the USDOC was under an obligation to consider using, as a starting point, in its benefit analysis a stumpage benchmark from within New Brunswick. We, therefore, have no basis, and decline to rule on Canada's claim under Article 14(d) that the USDOC improperly rejected the proposed stumpage benchmark in New Brunswick to determine the adequacy of remuneration for Crown timber provided to the respondent companies by that province.

8.4. For the procedural reasons set out in this Report, we also decline to rule on Canada's claims under Articles 19.3 and 19.4 of the SCM Agreement concerning certain reimbursements related to the respondent companies' obligations to perform silviculture provided by New Brunswick to JDIL, and by Québec to Resolute.

8.5. Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. We conclude that, to the extent that the measures at issue are inconsistent with SCM Agreement, they have nullified or impaired benefits accruing to Canada under that agreement.

8.6. Pursuant to Article 19.1 of the DSU, we recommend that the United States bring its measure into conformity with its obligations under SCM Agreement.

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