



TPSA | CANADA-INDONESIA TRADE AND
PRIVATE SECTOR ASSISTANCE PROJECT

Session 4 and Session 5

REVIEW OF WTO SCM AGREEMENT - Definitions and Procedures

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Subsidies and Countervailing Measures

- Object and Purpose
- Actionable vs Non-actionable
- Prohibitive Subsidies
- Multilateral Disciplines
- Countervailing Duties



Actionable vs Non-actionable

- Article 1.1 defines subsidy but does not impose any obligations
- WTO is not self-policing – other members must challenge a program or practice
- Part II – Prohibited Subsidies
 - Article 3 – Prohibition
 - Article 4 - Remedies
- Part III – Actionable Subsidies
 - Article 5 – Adverse Effects
 - Article 6 – Serious Prejudice
 - Article 7 – Remedies



Actionable vs Non-actionable

- Part IV – Non-Actionable Subsidies
 - Article 8 – Identification of Non-Actionable Subsidies
 - Article 9 – Consultations and Authorized Remedies
- Part V – Countervailing Measures
 - Article 10 – Application of Article VI of GATT 1994
 - Article 11 – Initiation of Subsequent Investigation



Agreement on Agriculture

Non-actionable

- Domestic subsidies
 - non-trade/production distorting
 - de minimis
 - de-coupled
- Important cases
 - Canada – Dairy
 - E.U. – Sugar
 - U.S. – Upland Cotton



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Developed vs Developing Countries

- Rules were written to favour U.S. / E.U.
- Blair House
- Closure on Uruguay Round
- Benchmarks went back to pre-1986
- Rich country budgets were protected



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Indonesia – Coated Paper

Programs Determined to be Countervailable

- A. Provision of Standing Timber for Less Than Adequate Remuneration
- B. Government Prohibition of Log Exports
- C. Debt Forgiveness through the Indonesian Government's Acceptance of Financial Instruments with No Market Value
- D. Debt Forgiveness through APP/SMG's Buyback of its Own Debt from the Indonesian Government

Source: USITC, Coated Paper, Investigation Nos. 701-TA-470-471 and 731-TA-1169-1170, Publication 4192, November 2010



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Specificity

- Article 2 – favours wealthy countries
- General benefits through the tax system
- Locational subsidies – big vs little
- Example of Canada
- Where does production go?
- Green field plant in Canada



Canada

Object and Purpose

- *S.2.1.1 US — Carbon Steel*, paras. 73-74
([WT/DS213/AB/R](#), [WT/DS213/AB/R/Corr.1](#))
- ... we turn to the object and purpose of the *SCM Agreement*. We note, first, that the Agreement contains no preamble to guide us in the task of ascertaining its object and purpose. In *Brazil — Desiccated Coconut* [Appellate Body Report, p. 17, DSR 1997:I, p. 167 at 181], we observed that the “*SCM Agreement* contains a set of rights and obligations that go well beyond merely applying and interpreting Articles VI, XVI and XXIII of the GATT 1947.”



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SCM Agreement

- The *SCM Agreement* defines the concept of “subsidy”, as well as the conditions under which Members may not employ subsidies. It establishes remedies when Members employ prohibited subsidies, and sets out additional remedies available to Members whose trading interests are harmed by another Member’s subsidization practices. Part V of the *SCM Agreement* deals with one such remedy, permitting Members to levy countervailing duties on imported products to offset the benefits of specific subsidies bestowed on the manufacture, production or export of those goods.



CVD PART V of SCM

- However, Part V also conditions the right to apply such duties on the demonstrated existence of three substantive conditions (subsidization, injury, and a causal link between the two) and on compliance with its procedural and substantive rules, notably the requirement that the countervailing duty cannot exceed the amount of the subsidy. Taken as a whole, the main object and purpose of the *SCM Agreement* is to increase and improve GATT disciplines relating to the use of both subsidies and countervailing measures.



Object and Purpose

- Among the objectives of the *SCM Agreement* is the establishment of a framework of rights and obligations relating to countervailing duties, and the creation of a set of rules which WTO Members must respect in the use of such duties. Part V of the Agreement is aimed at striking a balance between the right to impose countervailing duties to offset subsidization that is causing injury, and the obligations that Members must respect in order to do so. ...



Canada

Object and Purpose

- ... This is because countervailing measures may be used only for the purpose of offsetting a subsidy bestowed upon a product, provided that it causes injury to the domestic industry producing the like product. They must not be used to offset differences in comparative advantages between countries.
- *S.2.1.4 US — Softwood Lumber IV*, para. 109
([WT/DS257/AB/R](#))



Review of SCM Agreement

- SCM Article I – Prime Source-definition
- Financial contribution or
- Income or price support *and*
- Confers a benefit

- Price support – agriculture

- Financial contribution defined in SCM Article I
- What is a benefit?
- “Specificity” – not specific no CVD



Definition of Subsidy

- S.2.2.2 US — FSC, para. 93
([WT/DS108/AB/R](#))
- Article 1.1 sets forth the general definition of the term “subsidy” which applies “for the purpose of this Agreement”. This definition, therefore, applies wherever the word “subsidy” occurs throughout the *SCM Agreement* and conditions the application of the provisions of that Agreement regarding *prohibited* subsidies in Part II, *actionable* subsidies in Part III, *non-actionable* subsidies in Part IV and countervailing measures in Part V. By contrast, footnote 59 relates to one item in the Illustrative List of Export Subsidies.



Start With Article 1:1

- This definition applies throughout the *SCM Agreement*, to all the different types of “subsidy” covered by that Agreement. In our view, it was not a legal error for the Panel to begin its examination of whether the FSC measure involves export *subsidies* by examining the general definition of a “*subsidy*” that is applicable to export *subsidies* in Article 3.1(a). ...
- *S.2.2.1 US — FSC*, para. 89
([WT/DS108/AB/R](#))



SCM Article 1:1 is not an obligation

- *S.2.2.3 US — FSC (Article 21.5 — EC)*, paras. 85-86 ([WT/DS108/AB/RW](#))
- ... ***Article 1.1 itself does not impose any obligation on Members*** with respect to the subsidies it defines. It is the provisions of the *SCM Agreement* which follow Article 1, such as Articles 3 and 5, which impose obligations on Members with respect to subsidies falling within the definition set forth in Article 1.1. ...
- ... ***Article 1.1 of the SCM Agreement does not prohibit a Member from foregoing revenue that is otherwise due under its rules of taxation, even if this also confers a benefit under Article 1.1(b) of the SCM Agreement.*** ...



Financial Contribution

- By Government or any Public body
- In China what is a public body
- Direct transfer of Funds- loans, grants, equity infusion
- Potential transfers- loan guarantees
- Revenue forgone-tax credits, duty or tax waivers
- Government provides goods or services , government procurement (exception general infrastructure) *Pria Mole*
- Government funding of private body to undertake such activities in same manner as government would



Financial Contribution

- *S.2.3.1 US — Softwood Lumber IV*, para. 52 and footnote 35 ([WT/DS257/AB/R](#))
- An evaluation of the existence of a financial contribution involves consideration of the nature of the transaction through which something of economic value is transferred by a government. A wide range of transactions falls within the meaning of “financial contribution” in Article 1.1(a)(1). According to paragraphs (i) and (ii) of Article 1.1(a)(1), a financial contribution may be made through a direct transfer of funds by a government, or the foregoing of government revenue that is otherwise due.



Financial Contribution

- Paragraph (iii) of Article 1.1(a)(1) recognizes that, in addition to such monetary contributions, **a contribution having financial value can also be made *in kind* through governments providing goods or services, or through government purchases.** Paragraph (iv) of Article 1.1(a)(1) recognizes that paragraphs (i) — (iii) could be **circumvented by a government making payments to a funding mechanism or through entrusting or directing a private body to make a financial contribution.** It accordingly specifies that these kinds of actions are **financial contributions as well.** This range of government measures capable of providing subsidies is broadened still further by the concept of **“income or price support”** in paragraph (2) of Article 1.1(a).³⁵



Canada

Article 1.1(a)(1)(ii) — “government revenue ... otherwise due”

- **S.2.4.1** US — FSC, para. 90
([WT/DS108/AB/R](#))
- ... In our view, the “*foregoing*” of revenue “*otherwise due*” implies that less revenue has been raised by the government than would have been raised in a different situation, or, that is, “otherwise”. Moreover, the word “foregone” suggests that the government has given up an entitlement to raise revenue that it could “otherwise” have raised. This cannot, however, be an entitlement in the abstract, because governments, in theory, could tax *all* revenues. **There must, therefore, be some defined, normative benchmark against which a comparison can be made between the revenue actually raised and the revenue that would have been raised “otherwise”.**



Article 1.1(a)(1)(ii) — “government revenue ... otherwise due”

- We, therefore, agree with the Panel that **the term “otherwise due” implies some kind of comparison between the revenues due under the contested measure and revenues that would be due in some other situation.** We also agree with the Panel that the basis of comparison must be the tax rules applied by the Member in question.
...



Canada

The But For Test

- S.2.4.2 US — FSC, para. 91
([WT/DS108/AB/R](#))
- The Panel found that the term “otherwise due” establishes a “but for” test, in terms of which the appropriate basis of comparison for determining whether revenues are “otherwise due” is “the situation that would prevail but for the measures in question”. In the present case, this legal standard provides a sound basis for comparison because it is not difficult to establish in what way the foreign-source income of an FSC would be taxed “but for” the contested measure. ...



Limits on the “but for” test

- However, we have certain abiding reservations about applying any legal standard, such as this “but for” test, in the place of the actual treaty language. Moreover, **we would have particular misgivings about using a “but for” test if its application were limited to situations where there actually existed an alternative measure, under which the revenues in question would be taxed, absent the contested measure. *It would, we believe, not be difficult to circumvent such a test by designing a tax regime under which there would be no general rule that applied formally to the revenues in question, absent the contested measures.*** We observe, therefore, that, ***although the Panel’s “but for” test works in this case, it may not work in other cases.***



Canada

Otherwise due

- S.2.4.4 US — FSC (Article 21.5 — EC), paras. 88-89
([WT/DS108/AB/RW](#))
- ... the mere fact that revenues are not “due” from a fiscal perspective does not determine that the revenues are or are not “otherwise due” within the meaning of Article 1.1(a)(1)(ii) of the *SCM Agreement*.
- ... the treaty phrase “otherwise due” implies a comparison with a “defined, normative benchmark”. ... the comparison under Article 1.1(a)(1)(ii) of the *SCM Agreement* must necessarily be between the rules of taxation contained in the contested measure and other rules of taxation of the Member in question. ...



Revenue foregone *Canada* — *Autos*

- ... Canada has established a normal MFN duty rate for imports of motor vehicles of 6.1 per cent. **Absent the import duty exemption, this duty would be paid on imports of motor vehicles. Thus, through the measure in dispute, the Government of Canada has, “given up an entitlement to raise revenue that it could ‘otherwise’ have raised.”** More specifically, through the import duty exemption, Canada has ignored the “defined, normative benchmark” that it established for itself for import duties on motor vehicles under its normal MFN rate and, in so doing, has foregone “government revenue that is otherwise due”.
- ([WT/DS139/AB/R](#), [WT/DS142/AB/R](#) , para. 91)



Canada

Like for Like Benchmarks

- ... In identifying the appropriate benchmark for comparison [under Article 1.1(a)(1)(ii)], *panels must obviously ensure that they identify and examine fiscal situations which it is legitimate to compare. In other words, there must be a rational basis for comparing the fiscal treatment of the income subject to the contested measure and the fiscal treatment of certain other income. In general terms, in this comparison, like will be compared with like. ...*
- S.2.4.5 US — FSC (Article 21.5 — EC), para. 90 ([WT/DS108/AB/RW](#))



General Rule of Taxation

... We do not, however, consider that Article 1.1(a)(1)(ii) always *requires* panels to identify, with respect to any particular income, the “general” rule of taxation prevailing in a Member. **Given the variety and complexity of domestic tax systems, it will usually be very difficult to isolate a “general” rule of taxation and “exceptions” to that “general” rule.** Instead, we believe that panels should seek to compare the fiscal treatment of legitimately comparable income to determine whether the contested measure involves the foregoing of revenue which is “otherwise due”, in relation to the income in question.

US — FSC (Article 21.5 — EC), para. 91

[\(WT/DS108/AB/RW\)](#)



Canada

Benefit- *Canada* — *Aircraft*

- the word “benefit”, as used in Article 1.1(b), implies some kind of comparison. This must be so, for there can be no “benefit” to the recipient unless the “financial contribution” makes the recipient “better off” than it would otherwise have been, absent that contribution.
- the marketplace provides an appropriate basis for comparison in determining whether a “benefit” has been “conferred”, because the trade-distorting potential of a “financial contribution” can be identified by determining whether the recipient has received a “financial contribution” on terms more favourable than those available to the recipient in the market.
- ([WT/DS70/AB/R](#) para. 157)



**Article 1.1(a)(1)(iii) —
“Goods” provided by the government
*Softwood Lumber IV***

- A financial contribution exists where a government “provides goods or services other than general infrastructure, or purchases goods”. The Article contemplates two distinct types of transaction.
 1. where **a government provides goods or services** other than general infrastructure. Such transactions have the **potential to lower artificially the cost of producing a product by providing, to an enterprise, inputs having a financial value.**
 2. where a government **purchases goods** from an enterprise. This type of transaction has the **potential to increase artificially the revenues gained from selling the product.**
- ([WT/DS257/AB/R](#) para. 53)



Canada

Provision of goods and services

- *Softwood Lumber IV*, paras. 73, 75
([WT/DS257/AB/R](#))
- ... in our view, it does not make a difference, for purposes of applying the requirements of Article 1.1(a)(1)(iii) of the *SCM Agreement* to the facts of this case, if “provides” is interpreted as “supplies”, “makes available” or “puts at the disposal of”. What matters for determining the existence of a subsidy is whether all elements of the subsidy definition are fulfilled as a result of the transaction, irrespective of whether all elements are fulfilled *simultaneously*.



Provision of goods and services

- what matters, for purposes of determining whether a government “provides goods” in the sense of Article 1.1(a)(1)(iii), is the consequence of the transaction. **Rights over felled trees or logs crystallize as a natural and inevitable consequence of the harvesters’ exercise of their harvesting rights.** Indeed, as the Panel indicated, the evidence suggests that making available timber is the *raison d’être* of the stumpage arrangements. Accordingly, like the Panel, ***we believe that, by granting a right to harvest standing timber, governments provide that standing timber to timber harvesters. ...***



Canada

Article 1.1(a)(1)(iv) — Payments to a funding mechanism

- We observe that Article 9.1(c) does not require that payments be financed by virtue of government “mandate”, or other “direction”. Although the word “action” certainly covers situations where government mandates or directs that payments be made, it also covers other situations where no such compulsion is involved.¹¹³
- *Canada — Dairy (Article 21.5 — New Zealand and US II)*, para. 128 and footnote 113
([WT/DS103/AB/RW2](#), [WT/DS113/AB/RW2](#))



Canada

Article 1.1(b) — Conferral of a benefit to a recipient

- A “benefit” does not exist in the abstract, but must be received and enjoyed by a beneficiary or a recipient. Logically, a “benefit” can be said to arise only if a person, natural or legal, or a group of persons, has in fact received something. **The term “benefit”, therefore, implies that there must be a recipient. ...**
- *Canada — Aircraft*, para. 154
([WT/DS70/AB/R](#))



Canada

Benefit

- *S.2.9.3 US — Lead and Bismuth II*, para. 58
([WT/DS138/AB/R](#))
- We ... agree with the Panel's findings that benefit as used in Article 1.1(b) is concerned with the “benefit to the recipient”, [and] that such recipient must be a natural or legal person...



Benefit - US — *Lead and Bismuth II*

- The question whether a “financial contribution” confers a “benefit” depends, therefore, **on whether the recipient has received a “financial contribution” on terms more favourable than those available to the recipient in the market.** In the present case, the Panel made factual findings that **UES and BSplc/BSES paid fair market value for all the productive assets, goodwill, etc.,** they acquired from BSC and subsequently used in the production of leaded bars imported into the United States in 1994, 1995 and 1996. We, therefore, see no error in the Panel’s conclusion that, in the specific circumstances of this case, **the “financial contributions” bestowed on BSC between 1977 and 1986 could not be deemed to confer a “benefit” on UES and BSplc/BSES.** ([WT/DS138/AB/R](#) , para. 68)



Canada

Benefit - US — Countervailing Measures on Certain EC Products,

- privatization **does not remove the equipment** that a state-owned enterprise may have acquired (or received) with a financial contribution
- following privatization, the **utility value** of equipment acquired as a result of a financial contribution **is not extinguished**
- but, the **utility value** of such equipment to the newly-privatized firm **is legally irrelevant** for purposes of determining the continued existence of a “benefit”
- ([WT/DS212/AB/R](#) para. 102)



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Fair Market vs Utility Value

- once a fair market price is paid for the equipment, its *market value* is redeemed, regardless of the utility the firm may derive from the equipment. Accordingly, it is the *market value* of the equipment that is the focal point of analysis, and not the equipment's *utility value* to the privatized firm.
- *Countervailing Measures on Certain EC Products*, para. 102
([WT/DS212/AB/R](#))



Canada

Recipient - Countervailing Measures on Certain EC Products

- no specific SCM definition of the “recipient” of a “benefit”.
- Article 2 refers to “an enterprise or industry or group of enterprises or industries”;
- Article 6.1(b) refers to “an industry”; footnote 36 to Article 10 refers to subsidies “bestowed directly or indirectly upon the manufacture, production or export of any merchandise”;
- Article 14 refers to “the firm”; Article 11.2(ii) refers to “exporter or foreign producer”;
- Article 19.3 refers to “sources found to be subsidized”;
- Annex I refers to “a firm or an industry”; and
- Annex IV refers to the “recipient firm”.



Benefit and Recipient

- This is not an exhaustive list, but it certainly indicates that the *SCM Agreement* does not identify the “recipient” of a “benefit” by using any particular legal term of art.
- *SCM Agreement* uses several terms to describe the economic entity that receives a “benefit
- A transfer of funds could be provided directly from the government to the legal person that is the producer of the subsidized product, or it could be provided indirectly, say, through an income tax concession to the natural persons that own the firm (inasmuch as they invest in the legal person’s productive activities)



Direct and Indirect benefits US – Certain EU Products

- In both cases, the cost of raising capital for the legal person that is the producer would be reduced.
- Hence it is possible to confer a “benefit” on a firm by providing a financial contribution to its owners, whether natural or legal persons, possibly holding property by means of shares.
- Moreover, Article VI:3 of the GATT 1994 and footnote 36 of Article 10 of the *SCM Agreement* contemplate this possibility by providing that a subsidy may be bestowed “indirectly” upon the manufacture, production or export of merchandise. (emphasis added)
- ([WT/DS212/AB/R](#) paras. 112-113)



Appellate Body on benefit

- Article 1.1(a)(1)(iii) recognizes that subsidies may be conferred, not only through monetary transfers, but also by the provision of non-monetary inputs. Thus, to interpret the term “goods” in Article 1.1(a)(1)(iii) narrowly, as Canada would have us do, would permit the circumvention of subsidy disciplines in cases of financial contributions granted in a form other than money, such as through the provision of standing timber for the sole purpose of severing it from land and processing it.
- S.2.1.2 US — *Softwood Lumber IV*, para. 64 ([WT/DS257/AB/R](#))



Canada

Softwood Lumber from Canada

Investigation Nos 701-TA-566 and 731-TA-1342

Countervailable Subsidy Programs Alleged by Petitioner...	
Program	Province or Federal
Provision of Public Timber for Less Than Adequate Remuneration	British Columbia
	Quebec
	Ontario
	Alberta
	Manitoba
	Saskatchewan
	New Brunswick



Softwood Lumber from Canada

Investigation Nos 701-TA-566 and 731-TA-1342

Countervailable Subsidy Programs Alleged by Petitioner...	
Program	Province or Federal
Log Export Restraints	British Columbia
	Quebec
Investments in Forest Industry Transformation (IFIT)	Federal
Sustainable Development Technology Canada (SDTC)	Federal
Forest Innovation Program (FIP)	Federal
BC Hydro's Power Smart Load Displacement Program	British Columbia
BC Hydro's Electricity Purchase Agreements	British Columbia
New Brunswick's Large Industrial Renewable Energy Purchases Program	New Brunswick
Ontario's Northern Industrial Electricity Rate Program	Ontario
Quebec Power Purchase Program	Quebec
Quebec Provision of Steam For LTAR Under PAE 2011-01	Quebec
Tax Incentives for Private Forest Producers	Quebec
Income and Capital Tax Deferral Program	Quebec



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Softwood Lumber from Canada

Investigation Nos 701-TA-566 and 731-TA-1342

Countervailable Subsidy Programs Alleged by Petitioner	
Program	Province or Federal
Regional Tax Credit Program for Job Creation in Quebec	Quebec
Credits for the Construction and Major Repair of Public Access Roads and Bridges in Forest Areas	Quebec
British Columbia Motor Fuel Tax Refund for Off-Highway Purposes	British Columbia
Alberta Fuel Tax Exemption Program	Alberta
Export Development Canada: Export Guarantee Program	Alberta
New Brunswick Provision of Grants for Silviculture and Forest Management Services	British Columbia
Ontario's Forest Sector Prosperity Fund	Ontario
Ontario's Forest Sector Loan Guarantee Program	Ontario
Ontario's Refund of Stumpage Fees For 2005-2006	Ontario
Quebec Financial Aid for the Development Of Private Woodlots	Quebec
Western Economic Diversification	Regional



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Q&A and Discussion

Thank you for your participation.



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