United States - Preliminary Determinations with Respect to Certain Softwood Lumber from Canada

WT/DS236

EXECUTIVE SUMMARY OF THE ORAL STATEMENT OF THE UNITED STATES AT THE FIRST MEETING OF THE PANEL

May 6, 2002

1. Although some of the facts of this case are technically complex and can be confusing, in the end the issues are simple. The preliminary record indicates that the Canadian provincial governments provide timber to lumber producers at less than market prices. Under Article 1 of the WTO *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"), that is a subsidy.

2. Article 5 of the SCM Agreement states that "No Member should cause, through the use of any subsidy . . . , adverse effects to the interests of other Members, i.e. . . . injury to the domestic industry of another Member . . ." When one Member causes injury to the domestic industry of another Member through the use of *any* subsidy, the injured Member has the right to take countervailing measures. The United States' preliminary decision to exercise that right was fully warranted in this case.

Preliminary Subsidy Determination

3. Article 1.1 of the SCM Agreement defines a subsidy as a financial contribution by the government that confers a benefit. Thus, there are two elements to a subsidy: financial contribution and benefit.

Financial Contribution

4. The Commerce Department preliminarily determined that the system of timber contracts administered by the Canadian provincial governments constitutes a financial contribution within the meaning of Article 1.1(a)(1) of the SCM Agreement. Although Canada focuses on the complexities of these arrangements, none of those complexities alters the fundamental fact that these provincial programs provide timber to lumber producers.

5. Over 90 percent of the forested land in Canada is held by the provincial governments ("Crown timber"). Each province administers a system of contracts called tenures or licenses ("timber contracts") that allow the tenure holder or licensee to harvest the Crown timber.

6. There is no dispute that lumber producers participate in provincial timber contracts for one reason – to obtain timber. The definitions discussed in the U.S. first submission leave no doubt that timber is a good within the ordinary meaning of Article 1.1(a)(1)(iii). Nevertheless, Canada argues that when the provinces issue these contracts they are not providing a good – timber – to lumber producers, but the *right to take* timber off the land. Neither the SCM Agreement nor the facts of this case support Canada's claim.

7. Although there are some variations across the provinces, the core elements of all timber contracts are the same, that is, the lumber producer obtains the right to cut timber in a specified area in exchange for an administratively set fee, the "stumpage" fee, and the assumption of certain forest management obligations. The lumber producer knows the specific area in which it

will be able to harvest and knows the timber, that is, the species and quality of the trees. The producer pays stumpage fees only for the volume of timber actually harvested. The lumber producer is therefore obtaining a specifically identified good – timber.

8. Moreover, the ordinary meaning of "provide" includes "make available." Thus, the fact that a lumber producer has to get the timber off the stump is irrelevant. The economic consequences of providing a good or a right to a good are the same. To treat them as distinct would invite circumvention of the subsidy disciplines and seriously undermine their purpose.

9. Given the ample evidence that the provinces are providing lumber producers with timber, Canada's only hope is that the Panel will read into the SCM Agreement an exemption for all extraction and harvesting rights. There is no support in the text for such an exemption, and a treaty interpreter may not read into the SCM Agreement what is not there.

Benefit

10. The Commerce Department preliminarily determined that the provincial governments provide timber for less than adequate remuneration, within the meaning of Article 14(d) of the SCM Agreement, thereby conferring a benefit.

Cross-Border Benchmark

11. As the Appellate Body has confirmed, a benefit is conferred when the government's financial contribution places the recipient in a more advantageous position than would have been the case absent the financial contribution. Moreover, the Appellate Body has recognized that the marketplace provides an appropriate basis for comparison. In the underlying investigation, the Commerce Department preliminarily determined that no market benchmarks existed in Canada, and therefore used stumpage prices in U.S. states with comparable forests, adjusted to reflect prevailing market conditions in Canada.

12. Article 14(d) states that: "The adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase (including price, quality, availability, marketability, transportation and other conditions of purchase or sale)." Canada ignores most of that language and argues, in effect, that Article 14(d) says: "The adequacy of remuneration shall be determined in the country of provision or purchase." The treaty interpreter, however, must give meaning to all the words in the Agreement.

13. World market prices can constitute part of the "market conditions in the country of provision." As the European Communities ("EC") points out, the relevance of world market prices is recognized in item (d) of the Illustrative List of Export Subsidies in Annex I of the SCM Agreement.

14. Therefore, the question is not whether Article 14(d) permits a Member to use something other than a domestic benchmark price, but when it is appropriate to do so. The facts more than adequately support the Commerce Department's preliminary decision to do so in this case.

15. As noted previously, 90 percent of the forested land in Canada is held by the Crown. The market for timber is therefore dominated by the provincial governments. The impact of the governments' administratively set prices on the very small residual market is virtually inescapable. Nevertheless, the Commerce Department did request information on private prices in each of the provinces. Only three of the provinces responded, and the Commerce Department determined that the prices provided were not market-based. For example, the record contained statements by a Quebec official and a Canadian forestry expert acknowledging that private timber prices in Quebec are suppressed by the overwhelming market power of low-cost Crown timber.

16. It is evident why Canada would insist that the United States use prices in Canada despite the evidence of a market dominated by the provincial governments. Canada would require the United States to measure the governments' prices against prices that reflect the very distortion that we are attempting to measure. Article 14(d) does not require such an obviously flawed and circular methodology.

Benefit Calculation - Indirect Subsidies (Pass-Through)

17. The Commerce Department determined the total amount of the subsidy provided to Canadian producers of the subject merchandise based on aggregate data from the provincial governments. The Department then divided the total subsidy by total sales of the subject merchandise to obtain the subsidy rate. Canada claims that this calculation improperly assumed that benefits to tenure holders passed through to lumber producers. The United States does not, as the EC suggests, concede that this is the case. Some clarification of the facts is necessary to better understand the basis for the Commerce Department's subsidy calculation and shed light on the flaws in Canada's claim.

18. First, an input subsidy under Article 1.1(a)(1)(iii) is a direct subsidy. Under Canada's interpretation, all financial contributions through the provision of a good are transformed into an indirect subsidy under Article 1.1(a)(1)(iv). Canada's submission suggests that there are three distinct industries in Canada: loggers, lumber producers and remanufacturers. This is not the case. The vast majority of the Crown softwood timber is harvested under timber contracts held by integrated producers.

19. The vast majority of the timber contracts in Canada are directly between the provincial governments and Canadian forest products producers, or wood processing facilities. In most instances, only wood processing facilities, such as sawmills that produce lumber, are eligible to obtain a timber contract. Thus, Canada's alleged middleman between the provincial governments and the lumber producers is largely a myth.

Benefit Calculation - Denominator

20. Canada also claims that the Commerce Department should have included non-subject merchandise in the calculation of the subsidy. The United States excluded certain Maritime lumber from the scope of the investigation, not producers. Canada nonetheless argues that the calculation of the benefit must exclude Maritime lumber, but the denominator must include Maritime lumber. Canada's reasoning would result in a rate less than the subsidy found to exist with respect to the subject merchandise.

21. Canada also argues that the Commerce Department calculated the subsidy on the basis of the total value of first milled lumber products, but then applied the subsidy rate to the entered value of subject merchandise. Canada's claim ignores the fact that the Department's calculation and application of the subsidy rate was entirely consistent with the preliminary record before the Department at the time of the preliminary determination. As previous panels have stated, the consistency of an authority's decisions must be assessed based on an objective assessment of the facts before the authority at the time the decision was made.

Critical Circumstances

22. Canada's claims relating to the Commerce Department's imposition of retroactive provisional measures rest on an interpretation of Article 20.6 that would render the retroactive remedies provided for a nullity. It is beyond dispute that the general principles of treaty interpretation preclude such a reading of the Agreement.

23. The general rule in Article 21 that provisional measures and definitive duties are applied prospectively is expressly made "subject to the exceptions set out in [Article 20]." Nothing in Article 20.1 limits the applicability of those exceptions to definitive countervailing duties.

24. Article 20.6 defines a set of exceptional circumstances that warrant retroactive relief. Under the text of Article 20.1 those exceptional circumstances apply to provisional measures.

Reviews

25. Finally, Canada claims that various provisions of U.S. law are inconsistent with its obligations under the SCM Agreement because they preclude reviews in aggregate cases. Under established WTO jurisprudence, a Member's law breaches that Member's WTO obligations only if the law *mandates* action that is inconsistent with those obligations. If the law provides discretion to authorities to act in a WTO-consistent manner, the law, as such, does not breach a Member's WTO obligations.

26. U.S. law provides the Commerce Department with discretion to conduct expedited and administrative reviews in all cases, including aggregate cases. Nothing in the regulations cited

by Canada limits that discretion. Thus, U.S. law does not mandate action that is inconsistent with U.S. WTO obligations. The United States is entitled to the presumption that it will implement its obligations in good faith.