United States - Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada

(WT/DS257)

Closing Statement of the United States of America at the First Meeting of the Panel

February 12, 2003

1. Thank you Mr. Chairman, and members of the Panel. We spent some time last night digesting Canada's oral statement – along with some pizza – and some of the issues that were debated yesterday in response to the Panel's questions. In closing today, we would like to take a few moments to comment on some points in those discussions.

Financial Contribution

2. In paragraph 10 of its oral statement, Canada criticizes the United States' reliance on the definition of "goods" in *Black's Law Dictionary*, which cross-references the U.S. Uniform Commercial Code ("UCC"). I note first that, at paragraph 31, footnote 17, of Canada's first written submission, it relies on that same definition. Nevertheless, Canada asserts that the United States relies on an incomplete reading of a UCC provision cross-referenced in *Black's*. Canada states in paragraph 18 of its oral statement that this UCC provision "expressly excludes" standing timber, "except in certain limited circumstances that do not apply here." The UCC is, of course, not controlling in this forum. However, we will quote the relevant provision, which is included in Exhibit CDA-110, in its entirety.

> *A contract for the sale apart from the land* of growing crops or other things attached to realty and capable of severance without material harm thereto but not described in subsection (1) or *of timber to be cut is a contract for the sale of goods within this Article whether the subject matter is to be severed by the buyer or by the seller even though it forms part of the realty at the time of contracting,*

and the parties can by identification effect a present sale before severance.[1]

Thus, sales of standing timber are expressly "included" – not "excluded" – from the term "goods" as used in the UCC. We also refer the Panel to footnote 34 of our first written submission, which quotes a similar definition of "goods" in the British Columbia ("B.C.") Sale of Goods Act.

3. Canada also placed great emphasis in its oral statement on the argument that such things as intellectual property rights and fishing rights are not goods. This case is not, however, about intellectual property rights or fishing rights. It is about the sale of timber. The provinces award tenures almost exclusively to timber processing facilities, primarily lumber mills. The mills enter into tenure agreements that specifically identify the trees within a designated area as those that the mill may harvest. The mills pay to get that tangible timber – not intangible rights – and they pay only for the timber they harvest.

Benefit

4. With respect to record evidence concerning private stumpage prices, as we noted yesterday, Manitoba and Saskatchewan did not provide any data on such prices. With respect to the other provinces, Canada makes a number of statements on which we would like to comment:

- At paragraph 52 of its oral statement, Canada asserts that Timber Damage Assessments ("TDAs") are based on private transactions representing approximately 6 percent of Alberta's timber harvest. According to Alberta's questionnaire response, however, only 1 percent of the harvest in Alberta comes from private land. Of the remainder of the harvest, 1 percent comes from Federal

[1] UCC § 2-107 (2001) (emphasis added) (Exhibit CDA-110).

land, and 98 percent comes from provincial Crown tenures.[2] In addition, record evidence shows that 100 percent of the provincial Crown harvest is under tenure to processing facilities, 95.6 percent of which is under tenure to sawmills.[3] It is therefore difficult to see how TDAs could be based on private transactions representing 6 percent of the harvest in Alberta. In any event, as we noted yesterday, Alberta itself described TDAs as nothing more than the payment for damages. Alberta also describes TDAs as – I quote – "simply a set of voluntary guidelines outlining value calculations that can be used by private parties with rights on provincial land who are involved in negotiating appropriate compensation for damages . . . ."[4]

- At paragraph 53 of its oral statement, Canada states that B.C. submitted evidence that demonstrates that B.C. operates its stumpage system consistent with market principles. As explained in paragraph 107 of Canada's first written submission, however, that evidence merely established that B.C. made a profit on its timber sales. However, the fact that the province did not lose money selling Crown timber does not mean that it is receiving adequate remuneration.

- In paragraph 54, Canada also asserts that "[i]n all other cases where Commerce has found that the government played a dominant role in the market in question," it concluded that the remuneration was adequate if the government earned a profit. Canada does not cite the cases to which it refers in its oral statement, but it is reasonably safe to assume that they are the cases it has previously cited for the same proposition. Those cases involved the government provision of electricity and the government provision of port facilities. While it is true that the government was the dominant provider in each instance, that was not the reason for the choice of analysis. The United States relied on a profitability analysis only because it determined that there was no world market price for port facilities or electricity that was commercially available in the countries under investigation. Thus, unlike this case, no market benchmark price was available in those cases.

5. Regarding paragraph 58 of Canada's oral statement, we have several comments:

- Canada asserts that "the United States did no analysis" before concluding that data

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[2] *Issues and Decision Memorandum: Final Results of the Countervailing Duty Investigation of Certain Softwood Lumber Products from Canada*, 37 (March 21, 2002) ("*Issues and Decision Memorandum"*) (Exhibit CDA-1).

[3] Chart of Alberta Timber Holders Owning Wood Processing Facilities, Derived from Alberta's Questionnaire Response (Exhibit U.S.-44).

[4] Rebuttal Brief of the Government of Alberta, vol. 2, at p. 65, fn. 94 (March 1, 2002) (Exhibit U.S.-55).

regarding Canadian private timber prices did not reflect the actual value of government-provided timber, but "simply assumed that government market share demonstrates price suppression." In fact, the *Final Determination* analyzes the reliability of Canadian private timber prices in detail.[5]

- Canada also asserts that the Economists, Inc. study that the United States relied on did not analyze markets or price suppression. The study does, in fact, address that issue and concludes that the "existence of an administered market that is willing to supply the preponderance of market demand at an artificially low price drives the price that can be attained in the non-administrative sector below the level that would obtain if the administered market were not subsidized."[6]

- The student thesis Canada refers to is actually a 1995 doctoral dissertation that does, in fact, analyze data on Quebec's public and private timber harvests as recently as 1993.[7]

Market Distortion

6. In paragraph 80 of its oral statement, Canada claims that the United States ignored Canada's evidence "and simply assumed trade distortion." Canada is half right – the United States did not consider that evidence because it is legally irrelevant to whether Canada has conferred a countervailable subsidy. Canada is also half wrong – the United States did not "simply assume trade distortion." Rather, the United States determined that U.S. law does not require an analysis of whether a subsidy has market distorting effects.[8] Likewise, as discussed in our first written submission, at paragraphs 85-89, there is no obligation in the *Agreement on*

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[5] *Issues and Decision Memorandum*, at 36-38, 58-59, 76-78, 95-98, 110-111, 128, and 137 (Exhibit CDA-1).

[6] Economists, Inc., *Economic Analysis of Price Distortions in a Dominant-Firm/Fringe Market*, appended to Letter from Dewey Ballantine to Donald Evans (January 7, 2002) (Exhibit U.S.-22).

[7] Luc Parent, *A Financial Strategy for the Development of Private Timber Lands in Quebec* (translated) (June 1995), attached to Petition for the Imposition of Countervailing Duties Pursuant to Section 701 of the Tariff Act of 1930: Certain Softwood Lumber Products from Canada, Exhibit IV, G-6 (April 2, 2001).

[8] *Issues and Decision Memorandum,* at 48-50.

Subsidies and Countervailing Measures ("Subsidies Agreement") to find the existence of trade distortion to impose countervailing duties. The definition of a countervailable subsidy, as set forth in Article 1.1 of the Subsidies Agreement, requires a financial contribution, a benefit to the recipient, and, in accordance with Article 2, a finding that the subsidy is specific. Once those elements have been established, the only effect that must be demonstrated to impose countervailing duties is injury to the domestic producers in the importing country.

Calculation Issues

7. In paragraph 122 of its oral statement, Canada implies that Article 19.4 effectively imposes on Members obligations with respect to the calculation of the subsidy rate. Canada, however, fails to cite to any language in Articles 10, 19.1, 19.4 or 32.1 of the Subsidies Agreement, or Article VI:3 of the *General Agreement on Tariffs and Trade* ("GATT 1994") establishing any such obligations.

8. In paragraph 127 of its oral statement, Canada asserts that "there is no single log conversion factor." As the United States explained in paragraph 134, footnote 182 of its first written submission, the Canadian Government itself publishes a single conversion factor. Moreover, if the United States had used Canada's published conversion factor, the calculated subsidy rate would have been greater. The United States actually used one of two different conversion factors, depending upon the log scaling method used in the U.S. jurisdiction that was the basis for the benchmark calculations.

Administrative Reviews

9. With respect to administrative reviews, Canada improperly attempts to bring hypothetical future measures by the United States before this Panel. As the *U.S.–Lumber Preliminary Determination* panel stated, "the WTO dispute settlement system allows a Member to challenge a law as such or its actual application in a particular case, but not its possible future application."[9]

Conclusion

10. A final comment on the interpretation of Article 14(d) of the Subsidies Agreement. Canada went to great lengths – including slides – to criticize the United States for interpreting the words in Article 14(d). For example, Canada criticized the United States for interpreting "adequate remuneration" to mean "fair market value" even though, as quoted in paragraph 43, footnote 57 of our first written submission, Canada's own regulations define adequate remuneration as "fair market value." Furthermore, having criticized the United States for interpreting the language in Article 14(d) of the Subsidies Agreement, Canada then proceeded to criticize the United States for *failing* to interpret the specificity provisions in Article 2.1(c) of the Subsidies Agreement. In both instances, in fact, the United States interpreted the provisions in accordance with the ordinary meaning of their terms, in context, and applied the provisions accordingly.

11. That concludes our closing statement. The United States thanks the Panel for its time and efforts and we look forward to our continuing discussions in written submissions and the next meeting of the Panel.

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[9] Panel Report, *United States–Preliminary Determinations with Respect to Certain Softwood Lumber from Canada*, WT/DS236/R, adopted November 1, 2002, para. 7.157.