BEFORE THE

WORLD TRADE ORGANIZATION

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

WT/DS257

EXECUTIVE SUMMARY OF THE OPENING AND CLOSING STATEMENTS OF THE UNITED STATES AT THE FIRST MEETING OF THE PANEL

February 21, 2003

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

Financial Contribution

1. The first legal issue in this dispute is whether Canadian provincial timber sales systems constitute the provision of a "good" within the meaning of Article 1.1(a)(1)(iii) of the *Agreement on Subsidies and Countervailing Measures* ("SCM"). The text and context of Article 1.1(a)(1)(iii), and the object and purpose of the SCM, all lead inexorably to the conclusion that standing timber is a "good."

2. Canada argues that "goods" is limited to items that are tradeable across borders and subject to tariff classification. To the contrary, the ordinary meaning of "goods" is broad, encompassing all property and possessions, including things to be severed from the land, such as standing timber. The sole exclusion in Article 1.1(a)(1)(iii) for "general infrastructure" underscores the intent that the provision sweep broadly. "Infrastructure" is not tradeable across borders. Nevertheless, infrastructure that is *not* "general" must fall within Article 1.1(a)(1)(iii). To conclude otherwise is to render the explicit exclusion for infrastructure that *is* "general" entirely meaningless.

3. The uncontested facts leave no doubt that the provinces sell timber. There is one reason and one reason only that companies enter into provincial timber contracts, which we generally refer to as "tenures." They do so to obtain the government-owned timber for their mills. Through tenures, the provinces are providing a good – timber – to lumber producers. Accordingly, the provinces provide a financial contribution within the meaning of Article 1.1(a)(1)(iii) of the SCM.

Benefit

4. We turn to the methodology used to determine whether and to what extent the provinces confer a benefit on lumber producers through the sale of timber for less than adequate remuneration. This methodology poses two distinct issues. First, there is a question of legal interpretation of "benefit" within the meaning of the SCM. Second, there is the issue of the application of that legal concept to the particular facts of this case. It is imperative to examine the legal question before turning to the facts.

5. A financial contribution confers a "benefit" if it "makes the recipient 'better off' than it would otherwise have been, absent that contribution."[1] In determining whether a benefit has been conferred, the "marketplace" is the appropriate basis for comparison, i.e., the issue is whether "the recipient has received a 'financial contribution' on terms more favourable than those available to the recipient in the market."[2]

6. The guidelines in Article 14(d) of the SCM state that a benefit is conferred if the government provides the good for "less than adequate remuneration." Article 14(d) also states that the adequacy of remuneration shall be determined in relation to "prevailing market conditions" for the good in the country of provision. The concept of a comparison "market" therefore is central to the concept of

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[1] Appellate Body Report, *Canada–Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted August 20, 1999, para. 157.

[2] *Id.*

"benefit" generally, and to adequate remuneration specifically. The *Brazil–Aircraft* panel concluded that the concept of a comparison market necessarily means a "*commercial* market, i.e., a market undistorted by government intervention."[3] The United States agrees.

7. As the EC states in its third-party submission, "market" conditions exist where prices are "determined by independent operators following the principles of supply and demand." Thus, as the EC implicitly acknowledges, not all observed prices are necessarily "market" prices. We agree. "Market" prices are prices between independent buyers and sellers in a competitive market where prices are determined by the forces of supply and demand. Such prices represent what is commonly referred to as "fair market value." It therefore follows logically that adequate remuneration is fair market value. That is also how the term adequate remuneration is defined in Canadian law.

8. Article 14(d) sets forth the principle underlying the adequate remuneration inquiry – it must be made "in relation to prevailing market conditions" in the country of provision. However, Article 14(d) does not set out rules governing the specific types of data that may be used in conducting that analysis.

9. Where reliable commercial market prices are available in the country of provision, ignoring such prices would be inconsistent with Article 14(d). Where, however, no such prices exist or are unreliable, an investigating authority may use prices commercially available on world markets as the basis for an assessment of the adequacy of remuneration, provided that those prices are informative as to the fair market value of the goods in the country of provision.

10. There is no real dispute that there are circumstances under which an investigating authority may look to sources *outside* the country of provision for data to assess the fair market value of goods *in* the country of provision. The *U.S.–Lumber Preliminary Determination* panel,[4] Canada, the EC and Japan have all implicitly or explicitly acknowledged this. The real issue in this dispute is what factual circumstances warrant the use of price data from sources outside the country of provision to determine the fair market value of goods in the country of provision.

11. To determine the adequacy of remuneration in the underlying investigation, the United States calculated province-specific, species-specific market benchmark prices for stumpage. The United States requested data on private market transactions for stumpage in each province for the purpose of calculating those market benchmark prices. Three of the six provinces – Alberta, Manitoba and Saskatchewan – did not provide *any* data on private market prices for stumpage. Thus, there should be no dispute that the United States acted consistently with Article 14(d) in using commercially available prices from sources outside Canada to determine the fair market value of timber in those provinces.

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[3] Panel Report, *Brazil–Export Financing Programme for Aircraft*, WT/DS246/RW/2, adopted August 23, 2001, para. 5.29 (emphasis in original).

[4] *See* Panel Report, *United States–Preliminary Determinations with Respect to Certain Softwood Lumber from Canada*, WT/DS236/R, adopted November 1, 2002, para. 7.48.

12. British Columbia ("B.C.") submitted a survey containing a few average prices. The volume of the private timber on which those averages were based, however, represented less than one-half of one percent of the total timber harvested by the survey respondents. Moreover, the survey did not contain the detail or underlying support that would be necessary to calculate market benchmark prices. Ontario provided a limited survey and analysis of private stumpage sales in the province. Similarly, Quebec submitted an average price for private stumpage in the province, which was based on a survey.

13. The United States determined that there were no commercial market conditions – that is, a market undistorted by the government's financial contribution – in any of the provinces. The evidence, including the governments' dominant market share, the lack of incentive for sawmills to pay more for private stumpage than they pay the government, and statements by provincial officials and forestry economists concerning the impact of the government prices on the sale of private timber, is more than adequate to support that determination. Thus, although there is data on observed prices in certain provinces, the record demonstrates that those observed prices are not commercial market prices. Therefore, the United States acted consistently with Article 14(d) in using data from sources outside of Canada as the starting point for determining the fair market value of timber in Canada. Moreover, numerous adjustments were made to reflect conditions of sale in Canada.

Calculation Issues

14. Canada claims that the United States was required under Article 19 of the SCM and Article VI:3 of the GATT 1994 to conduct an "upstream" subsidy analysis. Canada makes this claim with respect to two distinct situations.

15. With respect to remanufacturers: The United States determined the total amount of the benefit, but did not determine what portion of the benefit individual sawmills or remanufacturers received. The United States allocated the total subsidy benefit over all sales of the products resulting from the lumber production process. The total amount of the subsidy benefit does not change, however, regardless of how the benefit is allocated. Thus, allocating a portion of the benefit to remanufacturers cannot overstate the total subsidy benefit. Moreover, nothing in Article 19 precludes this method of calculation. Article 19.3 specifically contemplates that a producer's exports may be subject to countervailing duties without knowing whether or to what extent that particular producer received a benefit. Article 19.3 simply obligates Members to provide expedited reviews for such exporters to calculate individual subsidy rates.

16. With respect to the second "upstream" subsidy situation, i.e., the alleged independent loggers: This is the only situation that could have any impact on the *calculation* – rather than the allocation – of the total amount of the benefit to producers of the subject merchandise. The record evidence indicates, however, that sales by independent loggers could only account for a very small portion of the volume of Crown timber entering sawmills. In addition, the evidence suggests that all or most of the sales by independent loggers may not be at arm's-length. Moreover, an upstream subsidy analysis requires company-specific data and analysis. Canada's claim that the United States was

required to conduct this type of company-specific analysis in the investigation is without foundation in Article 19 of the SCM or Article VI:3 of GATT 1994.

Specificity

17. Pursuant to Article 2.1(c) of the SCM, a subsidy is specific when the *users* of the subsidy are limited to certain enterprises or industries or to a limited group of enterprises or industries. The users of provincial stumpage are limited to timber processing facilities, which constitute a very limited group of industries. In accordance with Article 2.1, therefore, the subsidy from provincial stumpage is specific. Canada's claims to the contrary are based on its own definition of specificity, not the definition in Article 2.1. Article 2.1 does not require an investigation into the motives of Members that provide subsidies, does not require an analysis of the number of products made by the users of the subsidy, and does not require that a subsidy be limited to the producers of the subject merchandise, or that a "group of industries" must share common characteristics.

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

Financial Contribution

18. 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"). Canada, however, relies on that same definition. Nevertheless, Canada states that the UCC provision cross-referenced in *Black's* "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, the relevant provision reveals that sales of standing timber are expressly "included" – not "excluded" – from the term "goods" as used in the UCC. We also refer the Panel to our first written submission, which quotes a similar definition of "goods" in the British Columbia Sale of Goods Act.

Benefit

19. With respect to record evidence concerning private stumpage prices, Canada makes a number of statements at the first Panel meeting which we would like to comment on:

- Canada asserts that Timber Damage Assessments 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.

- Canada states that B.C. submitted evidence that demonstrates that B.C. operates its stumpage system consistent with market principles. That evidence merely established that B.C. made a profit on its timber sales, which does not mean that it is receiving adequate remuneration.

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

- The *Final Determination* analyzes the reliability of Canadian private timber prices in detail.

- The Economists, Inc. study that the United States relied on 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."

- The student thesis Canada refers to is actually a 1995 doctoral dissertation that analyzes data as recently as 1993.

Market Distortion

21. Canada claims that the United States ignored Canada's evidence "and simply assumed trade distortion." Rather, the United States determined that U.S. law does not require an analysis of whether a subsidy has market distorting effects. Likewise, there is no obligation in the SCM to find the existence of trade distortion to impose countervailing duties.

Calculation Issues

22. Canada implies that Article 19.4 effectively imposes obligations with respect to the calculation of the subsidy. Canada, however, fails to cite to any language in Articles 10, 19.1, 19.4 or 32.1 of the SCM or Article VI:3 of the GATT 1994 establishing any such obligations.

23. Canada asserts that "there is no single log conversion factor", yet the Canadian Government itself publishes a single conversion factor. And if the United States had used Canada's published conversion factor, the calculated subsidy rate would have been greater.

Administrative Reviews

24. 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."[5]

Conclusion

25. Canada went to great lengths 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 Canada's own regulations define adequate remuneration as "fair market value." Having criticized the United States for interpreting the language in Article 14(d), Canada then proceeded to criticize the United States for *failing* to interpret the specificity provisions in Article 2.1(c). In both instances, the United States interpreted the provisions in accordance with the ordinary meaning of their terms, in context, and applied the provisions accordingly.

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[5] *U.S.–Lumber Preliminary Determination Panel Report*, at para. 7.157.