

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

WT/DS236

**EXECUTIVE SUMMARY OF THE
FIRST WRITTEN SUBMISSION OF THE
UNITED STATES**

25 April 2002

I. INTRODUCTION

1. “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”¹ That obligation is the core of the dispute now before the Panel. 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.

2. The United States has acted entirely within its rights under the SCM Agreement in this case by taking provisional countervailing measures to offset the injurious subsidies that Canada provides to its lumber mills. Canada’s claims to the contrary are without merit. Canada is asking this Panel to ignore the text of the SCM Agreement and create exceptions to the subsidy disciplines for Canada’s decades-old system of subsidies to its lumber industry. In addition, Canada’s claims of WTO-inconsistent U.S. laws are, in reality, an effort to resolve a future dispute that may never occur. Therefore, consistent with the SCM Agreement and the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“DSU”), the United States asks the Panel to reject Canada’s claims.

II. STATEMENT OF FACTS

3. On August 17, 2001, the U.S. Department of Commerce (“Commerce Department”) published its Preliminary Determination, which contained a preliminary affirmative countervailing duty determination and a preliminary affirmative finding of critical circumstances. In the Preliminary Determination, the Commerce Department preliminarily found that provincial stumpage programs in Canada provided a countervailable subsidy to Canadian lumber producers. In addition, the Commerce Department found reasonable cause to believe or suspect that critical circumstances existed based on evidence that lumber producers received prohibited export subsidies and that there were massive imports of the subject merchandise over a relatively short period of time.

4. Accordingly, the Commerce Department imposed provisional measures (i.e., suspension of liquidation and posting of security in the form of cash deposits or bonds), effective on the date of publication of the Preliminary Determination, i.e., August 17, 2001. In light of the affirmative finding of critical circumstances, the Commerce Department ordered provisional measures applied to entries of the subject merchandise made during the period 90 days prior to the date of the publication of the Preliminary Determination.

III. STANDARD OF REVIEW

5. Article 11 of the DSU requires a panel to make an objective assessment of the matter before it and determine whether the identified measure is consistent with the provisions of the SCM Agreement upon which the claim is based. Panels cannot add to or diminish the rights and obligations provided in the SCM Agreement.

¹ Article 5 of the WTO *Agreement on Subsidies and Countervailing Measures* (“SCM Agreement”).

6. A panel does not conduct a *de novo* review of the evidence nor substitute its judgment for that of the competent authority. Moreover, the sufficiency of the evidence in this case should be judged in relation to the particular measure that Canada has challenged. It is important to bear in mind the preliminary nature of the determination at issue. The consistency of a preliminary determination with the obligations imposed on Members should be based on the record evidence before the authority at the time the determination was made.

IV. ARGUMENT

A. Canada Bears the Burden of Proving Its Claim

7. Canada, as the complainant, bears the burden of coming forward with evidence and argument that establish a *prima facie* case of a violation. If the balance of evidence is inconclusive with respect to a particular claim, Canada must be held to have failed to establish that claim.

B. The Preliminary Countervailing Determination Is Consistent With the SCM

1. Provincial Stumpage Programs Constitute a “Financial Contribution”

8. The Canadian provincial governments own approximately 90 percent of the forested land in Canada (“Crown land”), and the provincial governments control access to the timber on Crown land. The provinces enter into contractual arrangements that allow companies to harvest the timber on Crown land in exchange for an administratively set stumpage fee and the assumption of certain forest management obligations associated with harvesting operations. To be awarded such a contract, normally the company must either have a Canadian lumber mill, or have an agreement with a Canadian lumber mill to process all of the harvested timber. The vast majority of the Crown timber is awarded under long-term contracts that are not subject to competition (these contracts are usually referred to as tenures), with the fees set administratively by the provincial government.

9. In the Preliminary Determination, the Commerce Department concluded that these Canadian provincial “stumpage programs” constitute a financial contribution because they provide a good to lumber producers within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement. That good is timber.

10. Article 31 of the *Vienna Convention on the Law of Treaties*, which reflects customary rules of interpretation of public international law, states that a treaty shall be interpreted “in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Article 1.1 of the SCM Agreement defines a subsidy as a “financial contribution” by a government that confers a benefit. Article 1.1(a)(1)(iii) states that a financial contribution shall be deemed to exist where, *inter alia*, the government “provides goods or services other than general infrastructure.” The SCM Agreement does not specifically define

the meaning of “provides or “goods.” The Panel should look to the ordinary meaning of these terms.

11. The New Shorter Oxford English Dictionary defines “provides” as meaning, among other things, to “supply or furnish for use.” Black’s Law Dictionary defines “goods” as specifically including “growing crops, and other identified things to be severed from real property.” Provincial stumpage programs therefore constitute a “financial contribution” because they “supply or furnish” an “identified thing to be severed from real property,” i.e., timber.

12. The text of Article 1.1(a)(1)(iii) does not contain any exclusions for natural resources, nor can such an exclusion be read into the text. To the contrary, the Members evidently considered exceptions, and the sole exclusion from the phrase “goods and services” that they agreed on is reflected in Article 1.1(a)(1)(iii) itself, i.e., general infrastructure. It would be extraordinary if the Members intended *sub silentio* to provide a safe harbor for a broad group of government subsidies. Rather, this sole, express exclusion demonstrates that the Members intended to include all other goods and services.

13. Canada argues that provincial governments are not providing timber to lumber producers, but rather are merely granting the right to harvest the timber. There is, however, no meaningful distinction between providing the right to harvest timber and providing the timber itself. The provincial stumpage systems are designed for one purpose: to provide timber to Canadian mills that make lumber or wood pulp. Participation in these programs is restricted to Canadian sawmills or pulpmills, or companies that have contracts with Canadian mills to process the harvested timber. Furthermore, each of the provincial stumpage programs charges the tenure holder on a “volumetric” basis. Tenure holders do not pay stumpage fees for timber that they do not harvest. In light of these facts, it is obvious that the provincial governments are providing timber through these stumpage systems.

14. Moreover, the New Shorter Oxford English Dictionary defines “provides” as meaning to “make available” in addition to “supply or furnish for use.” Thus, even if provincial tenures are viewed as simply providing the right to take timber off the land rather than providing the timber itself, such a provision would still constitute the “provision of a good” within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement because the government is making the timber available. Therefore, the Commerce Department’s preliminary determination that provincial stumpage programs constitute the provision of a good is entirely consistent with the text of Article 1.1(a)(1)(iii) of the SCM Agreement.

15. The Commerce Department’s Preliminary Department is also consistent with the context, object and purpose of Article 1.1(a)(1)(iii). The object and purpose of the SCM is to impose multilateral disciplines on subsidies because of the “the trade-distorting potential” of government largesse. It is evident from Article 1.1 that the Members recognized that governments have a variety of mechanisms at their disposal to confer an advantage on specific domestic enterprises or

industries and that they intended to bring those mechanisms within the disciplines of the Agreement. Article 1.1(a)(1)(iii) should be interpreted in that context.

16. If the major input for a product is a natural resource – timber, bauxite, iron ore – a government that provides the natural resource to producers has the ability, depending upon the price charged, to provide an advantage that would not otherwise be available in the market. Canada’s attempt to exempt such potentially market-distorting government practices from the disciplines of the SCM Agreement has no basis in the text of the Agreement and is entirely at odds with its object and purpose.

2. Provincial Stumpage Programs Provide a “Benefit”

17. The *Canada Aircraft* panel stated that authorities must “determine whether the financial contribution places the recipient in a more advantageous position than would have been the case but for the financial contribution.”² In this case, the Commerce Department used market stumpage prices from comparable regions of the United States, adjusted as appropriate, as the benchmark price to determine whether the stumpage programs administered by the Canadian provincial governments provided timber to lumber producers on a more favorable basis than the marketplace would provide. The Commerce Department declined to use non-government prices between buyers and sellers within each province as the benchmark prices because provincial government sales constitute the overwhelming majority of timber sales in each of the provinces. As a result of the provincial governments’ dominance of the timber market, the Commerce Department could not conclude that non-government prices within the provinces were unaffected by the very distortion a market benchmark price is intended to measure, i.e., that they reflected the market “but for” the government financial contribution.

18. The Commerce Department’s decision to use a U.S. benchmark is consistent with Article 14 of the SCM, which sets forth guidelines for measuring the amount of the benefit to the recipient of a government’s financial contribution. Article 14(d) states that “the provision of goods . . . by a government shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration 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 . . . (including price, quality, availability, marketability, transportation and other conditions of purchase or sale).”³

19. The dictionary definition of “in relation to” is “with reference to.” Thus, under Article 14(d), the prevailing conditions in the country of provision are a reference point, not necessarily

² *Canada Aircraft - Measures Affecting the Export of Civilian Aircraft*, WT/DS70/R, Report of the Panel, as affirmed by the Appellate Body, adopted 20 August 1999, para. 9.112.

³ Emphasis added.

an end point, for the market benchmark. The proper benchmark measures the market but for the financial contribution. Thus, the issue is finding a market benchmark with reference to what the “in country” market would be but for the subsidy. It would therefore be improper to look outside a country simply to determine what the market value of a good is elsewhere in the world. It is, however, entirely proper to do so if one can use such prices, properly adjusted, to determine the market value of the good in the country under investigation.

20. Moreover, Article 14(d) states that the “prevailing market conditions” to be taken into account are the conditions of purchase or sale. Therefore, when read in context, “in relation to prevailing market conditions” requires the authority to determine the adequacy of remuneration with reference to market prices for transactions that, while not necessarily between buyers and sellers within the country of provision, are (or could be adjusted to be) comparable to the government transactions at issue with respect to the conditions of purchase or sale in the market.

21. The “in relation to” language in Article 14(d) demonstrates the Members’ intent to provide more flexibility in the selection of market benchmarks for determining the adequacy of remuneration for the provision of goods and services. This flexibility is evident elsewhere in the Agreement. The “market,” as generally referred to in the Agreement, is not restricted to the exporting country, but rather encompasses the entire market available to the subsidized producer or exporter. For example, Article 14(b) refers to comparable commercial loans available to the firm “on the market.” In *Canada Dairy*, the Appellate Body recognized this flexibility, confirming that “[w]orld market prices do . . . provide one possible measure of value of milk to producers” in Canada.⁴

22. Limiting the benchmark to the exporting country’s market would also seriously undermine the object and purpose of the SCM Agreement generally, and Articles 1.1(b) and 14(d) specifically. If the government were the sole provider of a good in the exporting country, for example, there would be no non-government benchmark prices in the exporting country to use as a point of reference and it therefore would be impossible to determine that the government had provided a benefit – even if it provided the good for a fraction of its value.

23. The trade-distorting potential of the government’s provision of a good can be identified only by reference to an independent market price, i.e., a price that is unaffected by the very trade distortion the test is designed to identify. If the comparison price were entirely, or almost entirely, dependent upon the government price, as in the case where the government sales overwhelmingly dominate the market, the analysis would become circular because the benchmark price would reflect the very market distortion that the comparison is designed to detect. Using prices largely dictated by the government to measure the adequacy of government prices would therefore defeat the purpose of Article 14.

⁴ *Canada - Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/AB/RW, Report of the Appellate Body, adopted on 3 December 2001, para. 84.

24. Whether a particular market benchmark price for the adequacy of remuneration is consistent with Article 14(d) must depend upon the facts of the particular case. Canada has failed to make a *prima facie* case that the Commerce Department's use of stumpage prices for comparable U.S. forests, adjusted to take into account differences in the conditions of sale (i.e., in relation to prevailing market conditions) in the Canadian timber market, is *per se* inconsistent with Article 14(d) where the government sales dominate the Canadian market. To the contrary, the Commerce Department properly determined that U.S. stumpage prices, as adjusted, represent prices under prevailing market conditions in Canada. The adjusted U.S. prices represent an appropriate measure of what Canadian prices would be but for the subsidy.

3. The Calculation Did Not Overstate the Subsidy Found to Exist

a. Exclusion of Maritime Lumber

25. The investigation in this case initially covered softwood lumber products from all Canadian provinces. After receiving comments from Canada, however, the Commerce Department subsequently excluded from the investigation imports of softwood lumber products produced in the Canadian Provinces of New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland (the "Maritime Provinces") from timber harvested in the Maritime Provinces ("Maritime Lumber").

26. In accordance with its aggregate methodology, the Commerce Department then calculated a single, country-wide rate based on the ratio of the total subsidy provided to producers of the subject merchandise to the total sales of the subject merchandise. In this calculation, neither the numerator nor the denominator included the excluded Maritime Lumber because Maritime Lumber was not subject merchandise, i.e., it was not within the scope of the investigation. Canada's alternative methodology would require the Commerce Department to allocate some portion of the aggregate subsidy found for subject merchandise to non-subject merchandise. The result of such a calculation would be a rate that would require the United States to impose duties in an amount *less* than the subsidy found to exist with respect to the subject merchandise. Articles VI:3 and 19.4 do not require such a result.

b. Total Value of All Sales that Canada Provided

27. The Panel should review the WTO consistency of the Commerce Department's Preliminary Determination based on the record before the Department at the time the determination was made. The record at the time of the Preliminary Determination establishes that the Commerce Department used in the denominator of its subsidy calculations the amount that Canada reported in its questionnaire response as the total value of softwood lumber sales, including all sales of first-mill lumber products and remanufactured products.

28. *After* the publication of the Preliminary Determination, Canada asserted, *for the first time*, that the total amount reported in its questionnaire response as the total value of softwood lumber sales did not, as indicated in its questionnaire response, include the value of remanufactured lumber shipments. Whatever the merits of this late claim by Canada that the data it submitted did not include sales of “remanufactured” products, that question is not before this panel. Factual determinations should be reviewed “as perceived by the [administering authority] at the time it made its determination based upon the record before it”⁵

4. Canada’s “Pass-through” Argument Is Inapposite

29. The stumpage subsidies at issue in this case are direct subsidies. As noted above, the provincial governments enter into tenure contracts with producers of the subject merchandise. As a general matter, there is no “private body” intermediary between the government and the recipient, as that term is used in Article 1.1(a)(1)(iv). Therefore, the provisions of Article 1.1(a)(1)(iv) do not apply to this case.

30. Furthermore, nothing in the SCM Agreement precludes a Member from issuing a preliminary determination and imposing provisional measures based on data establishing the total amount of the subsidy that the government provides to the subject merchandise. Although company-specific subsidy calculations may be preferred, they are not required. Canada does not contest this point.

31. The SCM Agreement simply requires that the countervailing duty rate applied not exceed the subsidy found to exist. As explained above, the Commerce Department in this case properly determined that Canadian federal and provincial governments provided subsidies to producers and exporters of softwood lumber, and properly calculated a country-wide subsidy rate based on the total amount of the subsidy preliminarily found to exist for the subject merchandise.

32. The Panel should reject Canada’s argument that the Commerce Department should have conducted a “pass-through” analysis. While such an analysis might be relevant for purposes of determining the level of subsidy received by a specific producer or exporter, no producer or exporter-specific subsidy rates are calculated in an aggregate investigation. The Commerce Department did not collect company-specific information, and Canada neither objected to the aggregate approach taken in this case nor recommended a company-specific approach. Nor did Canada supply any company-specific data to support its claim of the necessity of a “pass-through” analysis.

⁵ *United States - Antidumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea*, WT/DS179/R, Report of the Panel, adopted 2 February 2001, para. 6.29.

C. The Preliminary Critical Circumstances Finding Is Consistent with the SCM

1. Judicial Economy

33. As an initial matter, the United States notes that the Commerce Department issued a final negative critical circumstances finding in this case. The Commerce Department's preliminary critical circumstances finding is no longer of any practical consequence; retroactive provisional measures have been terminated and no retroactive assessment will be imposed. The Panel therefore should not address Canada's critical circumstances claim because it is not "necessary to resolve the particular matter."⁶ In this case, the normal course of the investigative process has resolved Canada's critical circumstances claim and has provided Canada with the relief it seeks.

34. If the Panel decides to resolve this issue on the merits, it should conclude that Canada has failed to make a *prima facie* case that the Commerce Department's preliminary critical circumstances finding was inconsistent with the SCM Agreement.

2. Authority to Impose Provisional Measures Retroactively

35. The Commerce Department's imposition of provisional measures on merchandise entered during the 90-day period prior to the publication of the Preliminary Determination is consistent with the text of Article 20 of the SCM Agreement, as well as with its object and purpose. Article 20.1 generally provides that provisional measures and final countervailing duties shall only be applied prospectively, i.e., to products that enter for consumption after the date of the preliminary determination under Article 17.1 or the final determination under Article 19.1, respectively. This rule, however, is not absolute. Article 20.1 expressly provides that the prospective application of provisional measures and final duties is "subject to the exceptions set out in this Article."

36. Article 20.6 of the SCM Agreement provides that a Member may assess final, definitive duties retroactively for a period "not more than 90 days prior to the date of application of provisional measures," if critical circumstances are present. Article 20.6 is intended specifically to provide retroactive relief in a "critical" situation. At the time of the preliminary determination, there may be a reasonable basis to believe or suspect that such a situation exists. However, retroactive assessment of definitive duties cannot be ordered until a final determination has been made many months later, following a full investigation. Absent suspension of liquidation, entries made 90 days prior to the preliminary determination might be liquidated during the intervening period. If the entries are liquidated, the possibility of retroactive relief, even though fully warranted, no longer exists.

⁶ *United States - Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, Report of the Appellate Body, adopted 23 May 1997, page 18; *E.C. - Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26,48/AB/R, Report of the Appellate Body, adopted 13 February 1998, para. 250.

37. Articles 17 and 20 of the SCM Agreement do not intend such an outcome. Article 17 of the SCM Agreement provides for the imposition of provisional measures to preserve a Member's right to relief once there is sufficient evidence to determine preliminarily that such relief is warranted. Retroactive provisional measures are essential to enable a Member to avail itself of the special remedy provided under Article 20.6. Therefore, Article 20.1 should be interpreted as providing for retroactive provisional measures where there is preliminary evidence of critical circumstances. A contrary interpretation would render Article 20.6 a nullity.

3. Basis for Critical Circumstances Findings

38. In order to find critical circumstances pursuant to Article 20.6 of the SCM Agreement, the authority must determine that there have been "massive imports" within a relatively short period, and that the imported product benefitted from "subsidies paid or bestowed inconsistently" with the SCM Agreement. The Commerce Department's preliminary finding of critical circumstances satisfied each of these requirements. An objective review of the facts in this case demonstrates that the Commerce Department had a reasonable factual basis to preliminarily determine that a Canadian province provided an export subsidy, which is prohibited under Article 3.1 of the SCM Agreement, and that imports of softwood lumber from Canada had increased more than 23 percent over the base period. Moreover, the ITC preliminarily found that imports of softwood lumber from Canada were injuring the U.S. industry before the Commerce Department made its preliminary critical circumstances determination. This preliminary injury determination, together with the evidence concerning prohibited subsidies and massive imports described above, constituted sufficient evidence to take the limited step of imposing provisional measures retroactively, pending the outcome of the full investigation.

D. Expedited and Administrative Reviews

39. Under established WTO jurisprudence, a Member's law violates 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 violate a Member's WTO obligations.

40. None of the U.S. laws that Canada challenges mandates that the United States take action inconsistent with its obligations under the SCM Agreement. U.S. law gives the Commerce Department broad discretion to conduct reviews. Until the Commerce Department exercises that discretion in a particular case, any exploration of the issues raised by Canada would be hypothetical. That is particularly true in this case because aggregate cases are extremely rare.

1. Section 777A(e)2)(A) and (B) of the Tariff Act of 1930

41. Section 777A of the Tariff Act of 1930, as amended (the "Act") implemented several changes to U.S. law to meet obligations under the SCM Agreement by eliminating the

presumption in favor of country-wide rates and establishing a general rule in favor of company-specific rates. Section 777A(e)(2) contains two exceptions to the general rule to address cases, such as the lumber case, where there is such a large number of exporters and producers that it is not practicable to investigate each company individually.

42. Canada has not cited a single provision in the SCM Agreement that prohibits the investigative procedures set out in Section 777A(e)(2), and nothing in Section 777A(e)(2) limits the Commerce Department's broad authority to conduct reviews. Canada has therefore failed to establish a *prima facie* case of a violation because it has utterly failed to establish that Section 777A(e)(2) is inconsistent with any provision of the SCM Agreement.

2. Expedited Reviews

43. The Commerce Department's regulations governing expedited reviews do not cover aggregate cases. As noted above, aggregate cases are rare and, because they have only been used in cases involving industries with an extremely large number of producers and exporters, they present unique issues with respect to expedited reviews. Because these cases are so rare, the Commerce Department has not yet addressed these issues, by regulation or in practice.

44. Section 751 of the Act gives the Commerce Department broad authority to conduct reviews. The fact that the Commerce Department has not elected to promulgate specific regulations for handling what could potentially be an extremely large number of expedited reviews in an aggregate case does not in any way diminish the Department's statutory authority to conduct such reviews. Statutory authority is sufficient; regulations are not essential. Therefore, the fact that 19 C.F.R. § 351.214(k)(1) does not cover expedited reviews in aggregate cases does not in any way prohibit such reviews. The Panel therefore should reject Canada's claim that 19 C.F.R. § 351.214(k)(1) mandates that the United States violate its obligation to provide expedited reviews.

3. Administrative Reviews

45. Section 751 of the Act also provides broad authority for the Commerce Department to conduct administrative reviews. Again, Canada erroneously concludes that the Commerce Department's regulations limit that authority and require the Department to deny administrative reviews in aggregate cases.

V. CONCLUSION

46. For the reasons set forth above, the United States requests that the Panel reject Canada's claims in their entirety.