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 ORAL STATEMENT OF THE UNITED STATES AT THE SECOND MEETING OF THE PANEL

April 3, 2003

1. The record demonstrates that the provinces own timber and, through provincial tenures, provide timber to lumber producers. There should therefore be no question that the provinces provide a financial contribution within the meaning of Article 1.1(a)(1)(iii) of the WTO *Agreement on Subsidies and Countervailing Measures* ("SCM").

2. The ordinary meaning of "goods" includes standing timber. Canada's argument to the contrary is reduced to the assertion that tenures are not sales of "timber to be cut," within the meaning of the U.S. Uniform Commercial Code ("UCC"), even though the sole reason for acquiring a tenure is to harvest timber, and the tenure holder pays for and receives title to only the timber it cuts. Moreover, the UCC provides that the sale of timber to be cut is always a contract for the sale of goods, regardless of whether the timber is "identified" at the time of the contract. More to the point, however, the provinces "provide" a "good" within the meaning of Article 1.1(a)(1)(iii) of the SCM.

3. Canada also suggests, without citation to record evidence, that many tenures create freely transferrable "rights to harvest." The record evidence establishes, however, that the provinces retain control over tenures, which cannot be transferred without the provinces' approval. The subcontracting of harvesting operations is not the sale or transfer of a "right to harvest." The tenure holder, not the subcontractor, remains at all times the province's contracting party.

4. It is the substance of what occurs in the provincial tenure systems that is controlling, i.e., whether a provision of goods takes place. As discussed in our previous submissions, the ordinary meaning of the terms "provides" and "goods or services other than general infrastructure" sweeps broadly. No matter how Canada characterizes provincial tenures, the fact remains that the provinces are providing timber to lumber producers. A financial contribution therefore exists.

5. The key legal issue in this dispute is whether Article 14(d) of the SCM precludes, in all cases, the use of data from sources outside the country under investigation to determine the adequacy of remuneration. As the Appellate Body has stated, the issue is whether "the 'financial contribution' makes the recipient 'better off' than it *would otherwise have been, absent that contribution*."[1] In other words, the Appellate Body recognized that in order to determine whether a financial contribution confers a benefit, it is essential to compare the position of the recipient with the financial contribution to what the position of the recipient would have been *absent* the financial contribution. Moreover, the Appellate Body's statement provides the context for the Appellate Body's conclusion that the point of comparison is the "marketplace." Thus, as the *Brazil – Aircraft* panel concluded, looking to the marketplace to determine whether the recipient is better off than it would otherwise have been absent the financial contribution necessarily means looking to a marketplace undistorted by the government's financial contribution.[2]

6. It is the view of the United States, as well as the European Communities, that Article 14(d) does not prohibit Members from relying on data from sources outside the country of provision to determine the adequacy of remuneration if reliable, market-driven pricing data does

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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] Panel Report, *Brazil – Export Financing Programme for Aircraft*, WT/DS46/RW/2, adopted August 23, 2001, para. 5.29 ("*Brazil – Aircraft Panel Report*").

not exist in the country of provision. We will not repeat the arguments supporting that conclusion, but will comment on Canada's flawed three-pronged analysis of Article 14(d).

7. First, Article 14(d) provides that the adequacy of remuneration must be determined "in relation to" prevailing market conditions in the country of provision. Canada, however, substitutes "in relation to" with "on the basis of" or "in comparison with." The more reasonable interpretation is that the broader phrase "in relation to" was agreed to by Members because Article 14 explicitly sets out "guidelines," i.e., general principles, not detailed rules. "In relation to" is sufficiently broad to allow for various means of performing a comparison that relates to market conditions in the country under investigation, rather than limiting Members to analyses "on the basis of," or "in comparison with," certain types of data. Permitted methods can include analyses that rely on data from sources outside the country, if the data is probative of the fair market value for the good in the country of provision.

8. Second, Canada ignores the word "market" in the phrase "prevailing market conditions," as if any conditions are "market" conditions. The Panel, however, must give meaning to the word "market." In that regard, the logic of the *Brazil – Aircraft Panel Report* is compelling. In determining whether the government's financial contribution confers a benefit – i.e., whether the recipient is better off with the financial contribution than it would otherwise have been absent the financial contribution – the "market" conditions must be conditions that are undistorted by the government's financial contribution.

9. Third, adequacy of remuneration must be determined in relation to prevailing market conditions "in the country of provision." That begs the question, however, whether there are in fact "market" conditions for the good "in the country of provision" that provide probative evidence for determining adequacy of remuneration. Where such evidence does not exist in the country of provision, as in this case, nothing in Article 14(d) precludes a Member from relying on market data from sources outside the country that is probative of fair market value in the country of provision.

10. The importance of using market benchmarks, even if they are based on data from sources outside the country of provision, is underscored by Article 15(b) of the *Protocol on the Accession of the People's Republic of China*,[3] which is cited, but misinterpreted, by Canada. The United States negotiated Article 15(b) of the China Protocol because the United States, along with other Members, recognized that China was in transition from a state-controlled economy to a market economy. Although Article 14(d) of the SCM permits the use of market data outside China, it only applies in countervailing duty cases under Part V of the SCM. Recognizing the importance of "market" benchmarks, the Members incorporated the language that Canada references in Article 15(b) of the China Protocol to clarify that external benchmark data can be used under Article 14(d) of the SCM, and also to ensure that such data can be used in proceedings under Parts II and III of the SCM.

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[3] *See* Accession of the People's Republic of China: Decision of 10 November 2001, WT/L/432, Article 15(b) (November 23, 2001) ("China Protocol") (Exhibit CDA-139).

11. Other provisions in the China Protocol likewise repeat obligations already binding on WTO Members. For example, the China Protocol provides that "China shall ensure that internal taxes and charges . . . shall be in conformity with the GATT 1994."[4] The inclusion of this provision does not mean that other Members need not ensure that their internal taxes conform to GATT 1994, yet this is effectively Canada's argument.

12. With respect to the facts of this case, the United States has, in its prior submissions and oral presentations, demonstrated that four of the six provinces did not provide private prices for timber that could be used for market benchmark purposes. Canada has failed to refute that fact. Rather, it argues that evidence that the provinces earn a profit on timber sales is sufficient to establish that they do not provide a benefit, even though those profit calculations do not include any cost or value for the trees themselves. More importantly, however, a sale for less than adequate remuneration – even a profitable one – confers a benefit.

13. The record evidence also demonstrates that the overwhelming state control of timber sales in Canada distorts sales in the private sector. Canada responds to this evidence by inviting the Panel to conduct *de novo* review. Canada argues, for example, that the United States "ignored" evidence of market conditions in Canada. The record in this case demonstrates that the United States in fact considered and weighed all of the evidence and was persuaded by economic analyses, which are cited to in the *Final Determination*, and other documentary evidence that the state-controlled timber sales systems distorted the private market.

14. Canada also now states that it has "consistently taken the position . . . that a price that is available to purchasers in the country of provision makes that price part of the prevailing market conditions in the country of provision."[5] Given that U.S. timber prices are available to purchasers in Canada, the United States' benchmark calculation is consistent with the position Canada now endorses. Canadian lumber producers can purchase U.S. timber, cut it (or have it cut), and transport it to their mills in Canada.

15. The United States has also established that the calculation of the market benchmarks included appropriate adjustments for conditions of sale in Canada. Canada's attempts to call those adjustments into question do not withstand scrutiny.

16. Finally, Canada has not made a *prima facie* case that the United States erred in failing to conduct a market distortion analysis. Canada has failed to identify any obligation in the SCM to conduct such an analysis because no such obligation exists. The United States' benefit calculation is consistent with Article 14. Nothing further is required, and obligations that are not found in the Agreement may not be imposed on the United States.

17. Under Article 2.1 of the SCM, a subsidy is specific if it is used by a limited number of industries or group of industries. The unrefuted record facts demonstrate that provincial tenures

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[4] China Protocol, Article 11(2) (Exhibit U.S.-93).
[5] Second Written Submission of Canada, para. 41 (March 6, 2003).

are used by a very limited group of timber processing industries. To construct an argument that these provincial programs are, nonetheless, not specific, Canada artificially inflates the very limited group of industries.

18. Canada interprets the term "industry" so narrowly that almost every product becomes an industry unto itself. Canada's dissection of the timber processing industries flies in the face of the ordinary meaning of "industry" as the term is used in Article 2. Moreover, Canada's position with respect to the timber processing industries is inconsistent with its acknowledgment that a subsidy used by a single large industry, such as automobiles or textiles, may be specific notwithstanding the diverse range of products the industry produces.

19. Canada also challenges the United States' specificity finding by inventing criteria that do not exist. Nothing in Article 2.1(c) requires an investigating authority to consider the government's intent or the "nature" of the good when determining whether a subsidy is specific. It is entirely permissible to find specificity based *solely* on the limited number of users.

20. Canada cites the negotiating history of the SCM in an effort to overcome the lack of any support in the text of Article 2.1(c) for its claim that Article 2.1(c) requires consideration of factors such as the "inherent characteristics" of the good and evidence of intentional targeting. In fact, the negotiating history that Canada cites demonstrates that such concepts ultimately were *not* adopted by the Members. The Members abandoned language on intent and "inherent characteristics" after the second Cartland draft, and such factors may not be read into the SCM.

21. The only additional factors that a Member must take into account under Article 2.1(c) are the extent of diversification of economic activities within the granting authority's jurisdiction and the length of time the subsidy program has been in operation. No one argued that the number of subsidy recipients is limited because the program had not been in operation long enough to be more widely distributed. The issue of economic diversification was raised only by British Colombia ("B.C."). The evidence B.C. submitted, however, demonstrated that the timber processing industries accounted for approximately 6 percent of B.C.'s economy. Thus, based on B.C.'s own data, 94 percent of B.C.'s economy did not use the provincial tenure system.

22. The United States' views on Canada's claims regarding the calculation of the ad valorem rate and the conduct of the investigation have been presented in our prior submissions and statements. We would like to make only a few additional points in response to Canada's second submission.

23. First, Canada mischaracterizes the United States' views on Article 19.4 of the SCM. Article 19.4 provides that the countervailing duty rate must be calculated on a per-unit basis. It also provides that the countervailing duty levied may not exceed the subsidy found to exist. That is the extent of the obligations in Article 19.4. The United States' argument that Canada has failed to identify any obligation in Article 19.4 to conduct an upstream subsidy analysis or to allocate subsidies by volume rather than by value is a far cry from arguing that a Member may impose countervailing duties at any rate it wishes. The fact remains, however, that Canada has failed to identify any obligation in Article 19.4 that supports its claim.

24. Second, the United States calculated the ad valorem duty rate by dividing the subsidy by the value of the output of the lumber production process. Canada argues that the numerator in that ad valorem rate calculation was impermissibly inflated by the inclusion of that portion of the Crown timber that ended up as products other than lumber. Canada's numerator argument is simply an argument that the United States was required to allocate the subsidy on the basis of volume rather than on the basis of value. As discussed previously, Article 19.4 simply obligates Members to calculate the countervailing duty rate on a per-unit basis. There is no requirement to allocate an input subsidy based on volume rather than value.

25. Third, Canada continues to suggest that the Minnesota Public Stumpage Price Report ("Minnesota Price Report") specifies a conversion factor of 6.25 for converting from thousand board feet to cubic meters. It does not. The Minnesota Price Report contains sawtimber prices reported in thousand board feet and pulpwood prices reported in cords. The price report contains a factor that Minnesota uses to convert between cords and board feet. The United States, however, only used the sawtimber prices, which are bid, sold, and reported in thousand board feet, and therefore needed to convert from board feet to cubic meters. The Minnesota Price Report does not contain such a conversion factor. We note, however, that the timber sales manual of the Minnesota Department of Natural Resources ("Minnesota Timber Sales Manual"), which publishes the Minnesota Price Report, was on the record. The Minnesota Timber Sales Manual provides a conversion factor of 3.48 cubic meters per thousand board feet. Canada does not, however, advocate using that conversion factor. Rather, Canada derived its own conversion factor from selected information in the Minnesota Price Report.

26. There is no one conversion factor that is universally accepted. The record evidence suggested a wide range of possible conversion factors, ranging from 3.48 to 8.51. The United States considered all of that evidence and provided a reasoned explanation for its decision to rely on the factors in the report by the International Trade Commission. The choice of conversion factor is therefore entirely consistent with the SCM.

27. Finally, Canada suggests that, even though the provinces knew the criteria the United States was using to select the benchmark states and had all the data on the states under consideration, Alberta and Saskatchewan were not on notice of the possibility that the United States could select a state more than 1,000 kilometers away. That assertion is contradicted by the record of the investigation. Alberta and Saskatchewan both argued that the United States should not use Montana as a benchmark state because of differences in the species mix. Saskatchewan also proposed using data from Alaska, which is more than 1,000 kilometers from, and obviously not contiguous with, Saskatchewan. Thus, it is evident that the provinces knew that factors such as climate, terrain, and species mix – not proximity – were the key considerations, and that a non-contiguous state might be selected for the benchmark. The record of the investigation therefore establishes that the provinces knew the essential facts under consideration.

28. For the reasons discussed above and in our prior submissions and presentations to the Panel, the United States asks the Panel to dismiss Canada's claims.