Volume 7 Number 2, 2006/p. 145-151 esteyjournal.com

The Estey Centre Journal of
International Law and Trade Policy

Technical Annex

Contingent Protection Measures and the Management of the Softwood Lumber Trade in North America: Eleven Rounds with the World Heavyweight Champ

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This document is the technical annex to the full paper "Contingent Protection Measures and the Management of the Softwood Lumber Trade in North America" which is available separately.

NAFTA Chapter 19 Binational Panel Decisions

Canada took its cause to the NAFTA in 2002. The panel's finding of July 17, 2003 was an unmitigated win for Canada. The panel ordered the Department of Commerce to correct its flawed determination of dumping against Canadian lumber producers.[1] In a second decision that same summer, the panel decided that Canadian stumpage fees are not countervailable subsidies under U.S. law.[2] In September of 2003, Canada won a third round at the NAFTA, when the panel disagreed with the International Trade Commission's finding that Canadian lumber posed a threat of injury to American lumber producers.[3]

Most significantly, the extraordinary challenge launched by the U.S. Trade Representative to appeal this decision was also in Canada's favor. On August 10, 2005, the ECC upheld the decision of the panel in *USA-CDA-2002-1904-07,* which

determined that there was no substantial evidence that Canadian lumber exports posed a material threat to the U.S. lumber industry.[4] Under CUFTA, and now under the NAFTA, panels have consistently ruled that Canada's softwood lumber industry does not pose a threat of injury to American producers.

WTO Panel Decisions

On May 19th, 2000, Canada requested consultations with the United States regarding the determination that Canada's export restraint on unprocessed logs was a subsidy to other producers who use logs as a manufacturing input.[5] The United States argued that the export restraint lowered the price of logs for domestic mills. In the panel's report released on June 29, 2001, the panel found that "an export restraint as defined in this dispute cannot constitute government-entrusted or government-directed provision of goods in the sense of subparagraph (iv) and hence does not constitute a financial contribution in the sense of Article 1.1(a) of the SCM Agreement."[6] The first round was a substantial win for Canada.

In August of 2001, Canada again requested consultations with the United States, this time concerning the DOC's preliminary countervailing duty determination against Canadian softwood.[7] The panel decision, released on September 27th, 2002 was Canada's second win. The panel found that the DOC's preliminary countervailing duty determination was not inconsistent with Article 1.1 (a) of the SCM Agreement. This means that the DOC did not err when it classified Canadian stumpage fees as a subsidy – it is possible to make a successful legal argument that stumpage fees convey a financial contribution. However, the United States failed to determine whether a material benefit had been conferred on Canadian harvesters by current stumpage rates. It also failed to establish that a benefit was conferred to Canadian mills through Canada's stumpage program and log export restraint. Therefore, the panel decided that the DOC's countervailing duty determination was inconsistent with U.S. obligations under the Subsidy and Countervailing Measures Agreement. At the implementation phase, the United States argued that it had implemented the panel's recommendations because the particular CVDs in question were no longer active. Canada responded that the United States had not changed the trade legislation that allowed for the original determinations.

The next panel decision on the same issue was released in August of 2003. The panel ruled that the ITC had acted inconsistently with SCM obligations because it failed to properly analyze the material injury suffered by American timber harvesters.[8] It did, however, rule upon the basic legality of challenging Canada's regulatory model.

The Appellate Body upheld the panel's finding that provincial methods for granting timber rights are actionable under the SCM. The United States reported that it would comply with the AB recommendations for implementation, but later announced that a new countervailing duty determination from the DOC was forthcoming and it would wait to see the outcome of the newest investigation. Canada launched a compliance panel, which reconfirmed that the United States remains in violation of its treaty obligations.

The fourth case dealt with the DOC's determination that Canadian lumber was dumped on the American market. Canada argued that the DOC erred by using a "zeroing" methodology to calculate dumping duties. "Zeroing" treats price comparisons that do not show dumping as zero values in the calculation of a weighted average dumping margin.[9] This means that when calculating the dumping margins, the DOC did not factor into calculations the Canadian timber sold at higher prices – zeroing these transactions instead of factoring them into the equation – this allows the DOC to levy higher antidumping duties and penalties. The panel found that the DOC failed to comply with the requirements of the Antidumping Agreement when it did not take into account all export transactions because of the "zeroing" methodology used in calculating the margin of dumping. The Appellate Body agreed.

The final case dealt with the International Trade Commission's finding that Canadian timber posed a threat to the U.S. industry.[10] In its report released March 22, 2004, the panel found that the ITC failed to comply with the requirements of Articles 3.5 and 3.7 of the Antidumping Agreement and 15.5 and 15.7 of the Subsidy and Countervailing Measures Agreement in finding a causal link between imports and the threat of injury to the domestic softwood industry. The Appellate Body upheld the panel's decision.

At the end of November in 2004, the DOC revisited its method for calculating dumping duties that were originally litigated in DS264. The methodology was revised based on a transaction-to-transaction comparison of the "normal value" of Canadian lumber on the domestic market and its price in the United States. This method was justified under Article 2.4.2 of the AD, which allows such comparisons. Canada disagreed and launched a compliance dispute. The panel reported back in April of 2006, allowing the DOC's revised calculation methodology.[11] Similarly, the ITC amended its methodology for determining material injury, and in the compliance phase of DS277 the panel upheld the legality of its new methods. These two cases are the only ones to undermine Canada's legal position vis-à-vis American softwood

producers. Subsequently, DS264 and DS277 will likely be hinge cases around which the U.S. industry will base subsequent legal defenses.

Related WTO Panel Decisions

Two other cases not directly related to softwood are also central to this dispute. The first is a Canadian complaint that Section 129(c)(1) of the Uruguay Round Agreements Act requires that authorities not consider Dispute Settlement Body rulings when making dumping determinations. This was an especially difficult case to make because nothing in WTO law requires that states formulate domestic law explicitly under the rubric of completed WTO agreements. If legislation is inconsistent with WTO obligations, members may raise the issue through dispute settlement. The panel ruled in July of 2002 that Canada had not made its case that section 129(c)(1) of the Uruguay Round Agreements Act was inconsistent with American obligations under the GATT, AD and SCM agreements.[12]

The second case was Canada and Mexico's complaint about the Continued Dumping and Subsidy Offset Act of 2000 (CDSOA), commonly known as the Byrd Amendment.[13] The CDSOA changed the way that dumping duties are collected. Rather than going into the U.S. treasury, duties were placed into separate accounts set up for each antidumping case. At the end of the fiscal year, they were distributed to companies directly involved in the case. Along with Australia, Brazil, Chile, the European Communities, India, Indonesia, Japan, Korea and Thailand, they argued that the Continued Dumping and Subsidy Offset Act of 2000 nullified or impaired benefits accruing to the complaining parties under the GATT, SCM and AD agreements, and the panel agreed. However, in its report the panel also noted that this sort of legislation is a new and complex issue for the WTO because it deals with the use of subsidies as trade remedies – a sensitive area where industrial policy and trade governance intersect. The Appellate Body upheld the main provisions of the panel report. In April 2005, the European Communities and Canada notified the DSB that they were suspending trade concessions under the GATT on imports of certain products originating in the United States in retaliation for American non-compliance with the panel ruling.

By the end of 2005, the United States repealed the Byrd Amendment. Congress's Governmental Accountability Office reported that duties collected, far from being a form of support for firms contending with unfair trade practices, were in fact a highly lucrative system of payments going to only a handful of companies, three of which were related.[14] In Congress, prominent Democrats and Republicans agreed

that the Byrd Amendment was, in the words of Jim Ramstad (R – MN) "the ultimate combination of protectionism, corporate welfare and government waste."[15]

Eleven Rounds with the World Heavyweight Champ

NAFTA Chapter 19 Binational Panel Decisions

USA-CDA-2002-1904-02 (Active) – July 17, 2003 – Win for Canada – The panel ordered USDOC to correct its flawed determination of dumping against Canadian lumber producers.
USA-CDA-2002-1904-03 (Active) – August 13, 2003 – Win for Canada – The panel decided that Canadian stumpage fees are not countervailable subsidies under US law.
USA-CDA-2002-1904-07 – September 5, 2003 – Win for Canada – The panel disagreed with the USITC's threat of material injury determination against Canadian lumber producers.
USA-CDA-2005-1904-01 (Active) – Investigation initiated, no report to date
USA-CDA-2005-1904-03 (Active) – Investigation initiated, no report to date
USA-CDA-2005-1904-04 (Active) – Investigation initiated, no report to date

NAFTA Chapter 19 Extraordinary Challenge Committee Decisions

ECC-2004-1904-01USA – August 10, 2005 – Win for Canada – The ECC upheld the decision of the panel in *USA-CDA-2002-1904-07*, which determined that there was no substantial evidence that Canadian lumber exports posed a material threat to the US lumber industry.

WTO Dispute Settlement Mechanism Panel Decisions

DS 194 – Panel released June 29 2001 – Win for Canada – The Panel found that an export restraint does not constitute a financial contribution in the sense of Article 1.1(a) of the SCM Agreement.
DS 236 – Panel released Sept. 27 2002 – Win for Canada – The Panel found that the USDOC's imposition of provisional CVD measures was inconsistent with the US obligations under the SCM Agreement
DS 257 – Panel release Aug. 29 2003, Appellate Body report June 19 2004, DSU Article 21.5 panel report August 1 2005 – Win for Canada – The Panel found that the USDOC Final Countervailing Duty Determination was inconsistent with Articles 10, 14, 14(d) and 32.1 SCM Agreement and Article VI:3 of GATT 1994.
DS 264 – Panel released April 13 2004, Appellate Body report Aug. 11 2004, DSU Article 21.3 arbitration report Dec 13, 2004 – Win for Canada, but undermined by the compliance panel decision – USDOC failed to comply with the requirements of

Articles 2.4.2 of the AD Agreement because it did not take into account all export transactions as it applied the "zeroing" methodology when calculating the margin of dumping.
DS 277 (Active) – Panel released March 22 2004 – Win for Canada, but undermined by compliance panel decision – The panel found that the USITC failed to comply with the requirements of Articles 3.5 and 3.7 of the AD Agreement and 15.5 and 15.7 of the SCM Agreement in finding a casual link between imports and the threat of injury to the domestic softwood industry.

Related WTO Panel Decisions

DS 221 – Panel Released July 15 2002 – Loss for Canada – The panel decided that Canada had not made the case that section 129(c)(1) of the Uruguay Round Agreements Act was inconsistent with American obligations under the GATT, AD and SCM agreements.
DS 234 – Panel released Sept. 16 2002 – Win for Canada – The panel finds that the Continued Dumping and Subsidy Offset Act of 2000 (the Byrd Amendment) nullified or impaired benefits accruing to the complaining parties under the GATT, SCM and AD agreements.

Source: Rahman and Devadoss 2002, Globe and Mail 2005, DFAIT, www.wto.org

Endnotes

1. Certain Softwood Lumber Products from Canada (Department of Commerce Final Determination of Sales at Less Than Fair Value), USA-CDA-2002-1904-02 (2002).
2. Certain Softwood Lumber Products from Canada (Department of Commerce Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination), USA-CDA-2002-1904-03 (2002).
3. Certain Softwood Lumber Products from Canada (USITC Final Injury Determination), USA-CDA-2002-1904-07 (2003).
4. Certain Softwood Lumber Products from Canada (Decision of the Extraordinary Challenge Committee), ECC-2004-1904-01USA (2005).
5. United States – Measures Treating Export Restraints as Subsidies, WT/DS194 (2000).
6. All panel reports can be accessed at www.wto.org
7. United States – Preliminary Determinations with Respect to Certain Softwood Lumber from Canada, WT/DS236 (2001).
8. United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada, WT/DS257 (2002).

9. For an in-depth discussion of zeroing and its effects on antidumping determinations, see United States – Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing), WT/DS264 (2003).
10. United States – Investigation of the International Trade Commission in Softwood Lumber from Canada, WT/DS277 (2002).
11. United States – Final Dumping Determination on Softwood Lumber from Canada - Recourse to Article 21.5 of the DSU by Canada, WT/DS264/RW (2006).
12. United States – Section 129(C)(1) of the Uruguay Round Agreements Act, WT/DS221 (2001).
13. United States – Continued Dumping and Subsidy Offset Act of 2000, WT/DS217, WT/DS234 (2000, 2001).
14. Issues and Effects of Implementing the Continued Dumping and Subsidy Offset Act. Washington: United States Government Accountability Office, 2005.
15. Bruce Odessey. House Panel Approves Repeal of Byrd Amendment after WTO Ruling [HTML File]. Washington File, 2005 [cited May 10th 2006]. Available from www.usinfo.state.gov.