

Dispute Settlement Body

1 November 2002

MINUTES OF MEETING

Held in the Centre William Rappard
on 1 November 2002

Chairman: Mr. Carlos Pérez del Castillo (Uruguay)

1. United States – Preliminary determinations with respect to certain softwood lumber from Canada

(a) Report of the Panel (WT/DS236/R)

1. The Chairman recalled that at its meeting on 5 December 2001, the DSB had established a panel to examine the complaint by Canada. The Report of the Panel contained in WT/DS236/R had been circulated on 27 September 2002, as an unrestricted document pursuant to the Procedures for the Circulation and Derestriction of WTO Documents contained in WT/L/452. He noted that the Panel Report was before the DSB for adoption at the request of Canada. He said that this adoption procedure was without prejudice to the right of Members to express their views on the Panel Report.

2. The representative of Canada said that his country welcomed the Panel Report and was requesting its adoption. As an initial matter, he wished to provide context to this dispute for Members that were not familiar with the history of trade in softwood lumber between two of the world's leading trading nations. In April 2001, the US Department of Commerce had initiated its fourth countervailing duty investigation on Canadian softwood lumber in 20 years. The United States had never succeeded in having independent adjudicators conclude that Canadian exports of softwood lumber to the United States were subsidized. On 9 August 2001, the United States had made a preliminary determination that Canadian softwood lumber exports to the United States were subsidized and had imposed a 19.31 per cent provisional countervailing duty on these exports. The United States had also made a preliminary critical circumstances determination and had applied those provisional measures retroactively. Canada challenged these determinations and was pleased with the Panel Report for several reasons. He said that the Panel had agreed with Canada that the United States had violated the SCM Agreement in finding that Canada's forest management practices were subsidies. Specifically, the United States had illegally compared Canadian stumpage rates to stumpage prices in the United States. Such a comparison was not "in relation to the prevailing market conditions in the country of provision", as provided for in Article 14(d) and was, therefore, illegal. The Panel had also agreed with Canada that the United States had breached the SCM Agreement by assuming, rather than establishing, that downstream purchasers of log and lumber inputs were subsidized through the exercise of timber harvesting rights by other upstream entities. The Panel had further agreed with Canada that the United States violated the SCM Agreement in applying provisional measures retroactively because the SCM Agreement did not permit the retroactive application of such measures under any circumstances. Finally, while Canada was pleased with the Panel Report overall, it was, however, concerned with the Panel's decision on the "financial contribution" requirement of the SCM Agreement. The Panel had found that standing timber constituted a "good" under Article 1.1(a)(iii). Canada was concerned with the breadth of the Panel's interpretation of the word "good".

3. The representative of the United States said that her country had decidedly mixed feelings about the Panel Report. On the positive side, the Panel had properly found that the Canadian provincial governments' sale to lumber producers of timber from public lands constituted a financial contribution that could give rise to a subsidy under the SCM Agreement. This was the most important issue in the case, and the Panel's finding on this issue was a fundamental victory for the United States. Canada had long argued that a government's sale of an *in situ* natural resource did not fall within the disciplines of the SCM Agreement and, therefore, could not be subject to countervailing duties under any circumstances. The Panel had conclusively rejected this argument. As a result, there was no longer any question that the United States could impose countervailing duties against softwood lumber imports from Canada. The only question was the amount of the countervailing duties that the United States could impose.

4. The Panel had also applied the well-established mandatory/discretionary distinction and had correctly found that US laws governing reviews of countervailing duty orders were not inconsistent with the SCM Agreement. The Panel had properly concluded that US laws did not preclude company-specific reviews in cases, like this one, where the United States calculated an aggregate, country-wide rate rather than company-specific rates because of the large number of exporters. The United States wholly endorsed both of these aspects of the Panel Report.

5. The United States, however, strongly disagreed with the Panel's findings on the cross-border methodology and the pass-through issues, findings handicapped by the limited nature of the record before the Panel. On cross-border methodology, she said that in its preliminary determination, the United States had used prices for comparable standing timber in contiguous US states as the benchmark to measure whether the government timber prices in Canada were below market value; i.e. provide a subsidy benefit. The United States used this benchmark because it had found that private timber prices in Canada were distorted by the overwhelming dominance of the government timber prices in the Canadian market. The Panel had rejected the use by the United States of this benchmark, however, and had concluded that investigating authorities might never, under any circumstances, use prices outside the country under investigation as a benchmark, even if that country had monopoly power and effectively controlled all prices in its domestic market. The United States had great difficulty understanding the Panel's logic that whenever a government subsidized its domestic industry to such an extent that it dominated the entire market, these subsidies could not be countervailed to the full extent of the subsidy.

6. With regard to pass-through, she noted that the Panel had also found that the United States had improperly failed to examine whether subsidies provided to producers of the upstream inputs (i.e. the harvesters who produce logs) benefit "independent" downstream producers (i.e. lumber producers) despite "arm's-length" transactions between the entities. With regard to arm's length transactions between independent parties where only one of the parties produced the subject merchandise (i.e. log sales between upstream harvesters and downstream sawmills), the United States agreed that the SCM Agreement required competent authorities to analyse whether the subsidy benefitted the downstream producers. In this case, however, the United States had reasonably concluded, based on the record of the preliminary investigation, that there were few, if any, actual "arm's-length" transactions between truly "independent" harvesters and sawmills. With regard to transactions between parties that both produce the subject merchandise (i.e. one sawmill sells logs to another sawmill), it made no sense to conduct a "pass-through" analysis in an aggregate case such as this one because the total subsidy was allocated over all sales of the subject merchandise. The amount of the benefit received by specific producers was simply not an issue in an aggregate case.

7. Notwithstanding its strong disagreement with these aspects of the Panel's findings, the United States had ultimately decided not to appeal for the following reasons. First, the measures in question in this dispute no longer existed. The preliminary countervailing duties that Canada had challenged in this dispute had already been refunded and the Panel Report had no practical effect on the final countervailing duties that were currently in place. In short, the Panel's findings in this report were

moot. Second, the cross-border methodology and pass-through issues were the subject of ongoing litigation in DS257, Canada's separate challenge to the final countervailing duty determination regarding softwood lumber from Canada. The Panel Report in this case was based only on a review of the limited record of the US preliminary determination. In contrast, the case DS257 would be based on the much fuller and more complete record of the United States' final investigation, which provided ample documentation and support for the US methodologies and decisions. Her country intended to defend the US measures at issue in DS257 vigorously. Finally, she said that in light of the fact that the erroneous parts of the Panel Report were the subject of ongoing dispute settlement proceedings and the measures at issue were no longer in existence, the United States was not appealing this Report. While the United States did not support its adoption, it understood that the DSB would do so at the present meeting.

8. The representative of the European Communities said that the EC wished to thank the members of the Panel for their Report which had adequately addressed all of the important and complex legal questions raised by the parties in this dispute. The EC would continue to follow with interest the softwood lumber dispute as a third party in the ongoing case brought by Canada against the final determination by the US Department of Commerce in the very same countervailing duty investigation like the one under consideration.

9. The DSB took note of the statements and adopted the Panel Report contained in document WT/DS236/R.
