Minister for International Trade | Ministre du Commerce extérieur

COMMUNIQUÉ

No. 190 October 31, 1986.

DIPLOMATIC NOTE ON SOFTWOOD LUMBER

COUNTERVAILING DUTY INVESTIGATION

The Honourable Pat Carney, Minister for International Trade, announced today that the Government's formal response to the preliminary subsidy determination made by the U.S. Commerce Department in the softwood lumber case was delivered to the State Department late yesterday. A copy of the Note is attached.

The Note outlines in detail the Government's view that the preliminary decision is seriously flawed both in terms of U.S. law and logic.

"We believe that the U.S. position is fundamentally wrong", said the Minister. Governments have a sovereign right to establish conditions for the management and utilization of their natural resources. "Stumpage clearly does not constitute a subsidy and the imposition of countervailing duties is therefore inappropriate." The Minister noted that Canada has asked the GATT to rule on this basic question.

The Minister went on to stress that "this decision, which reverses the 1983 determination that stumpage is generally available, is not well founded." Commerce's assertion that provincial discretion is exercised so as to favour a particular industry is wrong. Stumpage rights are available on equal terms to all companies which can exploit the resource on an economic basis. In addition, stumpage is used by several industries comprising hundreds of companies turning out quite different products. The reasoning behind this decision should be of concern to all trading partners of the United States, said the Minister. "Indeed as a major exporter of natural resource products, the U.S. itself could be adversely affected were the reasoning employed in this decision to be adopted by other countries."

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In a letter to Secretary Baldrige delivered today in Washington, Minister Carney emphasized that "the methodology used to determine that stumpage is provided at preferential rates is simply wrong." Resort to this methodology has grossly inflated the provisional rate of countervail duty which is causing immediate hardship for Canadian exporters and workers, said the Minister. She added that Ambassador Gotlieb had met with Commerce Secretary Baldrige earlier this week to urge that, as an immediate measure, the Department revise its preliminary determination to remove the double counting of costs and thereby reduce the burden on the Canadian industry of posting bonds on the basis of an inflated rate of provisional duty.

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Note

The Canadian Embassy presents its compliments to the Department of State and has the honour to refer to the preliminary determination by the Department of Commerce in the countervailing duty investigation of certain softwood lumber products imported from Canada and to its note of September 30 as well as to its aide-memoire of June 4, 1986 which strongly urged rejection of the petition filed by the U.S. lumber coalition. This investigation places at risk the mutually beneficial trade in softwood lumber products valued at Cdn $3.8 billion in 1985, and has serious adverse implications for employment, in the U.S. as well as in Canada, and for U.S. lumber consumers. In Canada, there are 80,000 jobs directly related to our softwood lumber industry and every region of the country stands to be affected.

It will be recalled that the same basic issues were addressed in an exhaustive fashion by the Department of Commerce in the 1982-83 countervailing duty investigation involving imports of softwood lumber from Canada. With respect to the primary issue at stake, namely provincial stumpage, the International Trade Administration rejected the allegation that it conferred either an export or a domestic subsidy on Canadian lumber producers. All countervailable Canadian programmes were also found in that investigation to be de minimis. It is significant that the petitioner in the previous investigation did not exercise its rights to appeal the 1983 decision of the Department of Commerce to the courts.

It is the position of the Government of Canada that, as governments have a sovereign right to establish conditions for the management and utilization of their natural resources, stumpage cannot properly be considered to constitute a subsidy and that use of the countervailing duty remedy is therefore inappropriate. In the view of the Government of Canada it is clear, based on the drafting history of the GATT and the Subsidies/Countervail Code, that it was never intended that policies regarding access to natural resources, including pricing, were to be covered by the subsidy and countervail provisions of the GATT or the Code.

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However, as the Department of Commerce has seen fit to accept a countervailing duty petition, the following comments are made without prejudice to our fundamental position as stated above.

It is the view of the Canadian authorities that this determination is unacceptable. It is flawed in law, inconsistent with established U.S. practice and, in some important respects, based on erroneous assumptions.

The Department of Commerce has reversed itself on two fundamental points from its determination in the earlier 1982-83 investigation. One of these relates to the question of general availability, the other to that of preferential rates.

With respect to the issue of general availability, Commerce has now ruled, in contrast to its previous determination, that stumpage programs in the four main producing provinces of Alberta, British Columbia, Ontario and Quebec are targeted to a specific group of industries. It bases this ruling on two grounds. The first is that the provincial governments possess considerable discretion in the allocation of stumpage licenses and that this discretion tends to be exercised in favour of softwood lumber mills. In fact, provincial discretion is not exercised so as to favor the softwood lumber industry or any other industry utilizing the resource. Stumpage rights are available on equal terms to all companies which can exploit the resource on an economic basis.

The second ground is that, of the various users of stumpage, furniture manufacturers own negligible rights while the lumber and pulp and paper companies tend to be horizontally integrated into single enterprises. While it is true that today few furniture companies hold stumpage rights, this is because of market factors and the economics of specialization; stumpage rights are available to them on equal terms with other users.

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With respect to the point on horizontal integration, there are hundreds of companies with stumpage rights which are not horizontally integrated. In any event the point is irrelevant as the lumber, pulp and paper industries and the many others using the resource such as plywood, veneer, building boards and shingles and shakes operate in separate markets and are clearly different industries. With the spread of conglomerates, to hold otherwise would be patently absurd.

With respect to the manner in which the decision on general availability was reached, Canadian authorities consider that it is contrary to fundamental precepts of U.S. law and natural justice to have placed on the respondent the burden of proof to establish that stumpage is generally available. It should have required the petitioner to establish the validity of its allegations, particularly when, in essentially the same circumstances, it is seeking a reversal of a previous determination which was not appealed. Nevertheless, Canadian authorities are prepared to provide any further information required to ensure that the final determination will be based on all of the facts and not merely on the petitioners' allegations.

Having made this finding on general availability, Commerce was required to examine whether, and to what extent, stumpage is being made available at preferential rates. Here again, Commerce officials have departed radically from established countervailing duty law and practice. Commerce officials have erred fundamentally in adding the direct cost of producing standing timber to an indirect cost representing the imputed value of trees and land. Such a methodology, which confuses "costs" and "value" and adds them together, inevitably results in double-counting which inflates the alleged subsidy.

Such an approach is not among the criteria listed in the statute and appears to be an indirect way of expanding the definition of "domestic subsidy" set forth in Section 771(5)(B) of the U.S. Tariff Act of 1930. While purporting to be finding preferential rates, as laid down in Section 771(5)(B)(ii), Commerce has actually used a cost of production analysis, as provided in Section 771(5)(B)(iv). This ignores the limitations that previous decisions have placed on subsection iv as well as the previous interpretation that subsections i through iv are "mutually exclusive".

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In numerous determinations and policy statements, Commerce has repeatedly refused to use imputed or opportunity costs in determining such costs of production. It has, in fact, maintained that the only proper measure of cost is the actual cost to the producer.

In its 1983 determination, Commerce specifically found that the value of stumpage does not derive "from any intrinsic value of the standing timber".

The analysis is also internally inconsistent. While surrogate values were used to determine imputed indirect costs, these were specifically rejected elsewhere in this determination as appropriate benchmarks for calculating preferentiality. Moreover, the use of private sale prices in New Brunswick as a surrogate for the intrinsic value of trees in Quebec and Ontario - whose forests in many cases are over a thousand miles away from New Brunswick - is inappropriate having regard to the significant differences in the nature of the forests and conditions of access to the resource and to markets.

Finally, there has been little attempt in the determination to explain these various inconsistencies and departures from precedent.

In view of these considerations, the Canadian authorities urge that the preliminary determination be revoked and the investigation be terminated.