International Lawyer

Volume 21 | Number 4 Article 10

1987

U.S. Trade Law and Policy Series #11 The U.S.-Canada Lumber Agreement: Past as Prologue

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CURRENT DEVELOPMENTS

U.S. Trade Law and Policy Series #11 The U.S.-Canada Lumber Agreement: Past as Prologue

In December 1986 the United States and Canada concluded an agreement under which Canada agreed to apply an export tax to certain softwood lumber products shipped to the United States. This article traces this agreement's origins, from countervailing duty investigations in 1982-83, through subsequent developments in the interpretation and application of the countervailing duty law, to the most recent lumber subsidy case last year. It then assesses the significance of this agreement from a trade policy perspective.

I. The 1982-83 Lumber Countervailing Duty Investigations

In October 1982 the United States Coalition for Fair Canadian Lumber Imports filed a petition under the countervailing duty (CVD) law[1] alleging that imports of certain softwood lumber products[2] were subsidized by the Government of Canada and caused or threatened material injury to an industry in the U.S. The Coalition's main charge was that the Canadian federal and provincial governments subsidized softwood products by selling standing timber (stumpage) at prices well below those charged in the

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1. Tariff Act of 1930, § 303 and title VII, subtitle A, as amended, 19 U.S.C. §§ 1303, 1671-1671h, 1675-1677g (1982 & Supp. III 1985). The petition was filed under § 702 of the Act, 19 U.S.C. § 1671a (1982 & Supp. III 1985).

2. Softwood lumber, softwood shakes and shingles, and softwood fence.

United States. The Department of Commerce (Commerce)[3] initiated an investigation,[4] and the International Trade Commission preliminarily found that such imports caused or threatened injury to a U.S. industry.[5]

Both preliminarily[6] and finally,[7] Commerce found no countervailable subsidy conferred by the Canadian federal or provincial governments.[8] First, Commerce found that the principal subsidies alleged were not countervailable because they were not provided to a specific industry or group of industries, as required by section 771(5) of the Tariff Act of 1930, as amended (the Act).[9] Commerce found that stumpage was available to anyone on equal terms. The use of stumpage was limited not by governmental action, but only by the inherent characteristics of this natural resource and the production technology.

Commerce declared, however, that such "nominal general availability" of a program does not necessarily suffice to avoid its being classified as a targeted subsidy provided to a specific industry or group of industries. Commerce therefore also reviewed the actual use of stumpage in Canada, and additionally determined that it was used by diverse industries making numerous products.[10] On these bases Commerce found that the Canadian federal and provincial governments' stumpage programs did not benefit a specific group of industries.[11]

Additionally, Commerce found that the Canadian governments' stumpage programs did not confer a subsidy. First, Commerce determined that they did not constitute an export subsidy. It noted that the availability of the benefits was not contingent upon export performance. Moreover, they did not have the effect of stimulating export sales over domestic sales.

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3. The Department of Commerce is the "administering authority" referred to throughout the CVD law. *See* Exec. Order No. 12,188, 3 C.F.R. §§ 131, 135 (1983), *reprinted in* 5 U.S.C. app. at 1170 (1982).

4. Certain Softwood Lumber Products from Canada (Lumber), 47 Fed. Reg. 49,878 (Dep't Comm. 1982) (initiation).

5. Certain Softwood Lumber Products from Canada, USITC Pub. 1320, Inv. No. 701TA-197 (Nov. 1982).

6. 48 Fed. Reg. 10,395 (Dep't Comm. 1983) (prelim. determination).

7. 48 Fed. Reg. 24,159 (Dep't Comm. 1983) (final determination).

8. More precisely, Commerce found total estimated net subsidies of 0.349% ad valorem for softwood lumber, 0.260% ad valorem for softwood shakes and shingles, and 0.304% ad valorem for softwood fence. However, these subsidies were considered de minimis.

9. Tariff Act of 1930, as amended, § 771(5), 19 U.S.C. § 1677 (1982 & Supp. III 1985), provides in part: "The term 'subsidy' . . . includes, but is not limited to, the following: . . . (B) The following domestic subsidies, if provided or required by government action to *a specific enterprise or industry, or group of enterprises or industries*. . . ." (Emphasis added.)

10. In this regard, it noted that under the classification systems of both Canada and the United States, the lumber and wood products, pulp and paper, and furniture and manufacturing industries constitute at least three separate groups of industries. 48 Fed. Reg. at 24,159.

11. *Id.*

Second, Commerce determined that these programs did not confer a domestic subsidy, either. Commerce determined that Canadian stumpage programs involved the provision of a good (raw timber) and therefore fell squarely within subsection 771(5)(B)(ii) of the Act's illustrative list of domestic subsidies.[12] This provision identifies a subsidy as the "provision of goods . . . at preferential rates."[13] Commerce interpreted "preferential" normally to mean "only more favorable to some within the relevant jurisdiction than to others within that jurisdiction."[14] Commerce expressly found that "preferential" does not have the same meaning as "inconsistent with commercial considerations," a distinct term used in subsection 771(5)(B)(i) of the Act.[15] Commerce importantly noted, however, that there may be cases where the number of users of a good or service is so limited that further examination of the preferentiality test would be required.[16]

Commerce next determined that subsections 771(5)(B)(i)-(iv) are mutually exclusive. Where a particular subsection clearly covers a given program, the determination whether that program bestows a subsidy is governed by the standard in that subsection.

Assuming *arguendo* that subsection (iv) also applied to stumpage programs, Commerce considered whether those programs "assume" a cost of production, as petitioner maintained. Petitioner argued that "assumption" should be interpreted broadly to encompass any governmental action that reduces or absorbs production costs on terms inconsistent with commercial considerations. However, Commerce interpreted "assumption" as "refer[ing] only to government action which relieves an enterprise or industry of a pre-existing statutory or contractual obligation."[17] It adopted a narrow interpretation because a broad reading of subsection (iv) would embrace all the activities described in the preceding three subsections, since all the activities described therein reduced or absorbed costs of production.[18]

12. 19 U.S.C. § 1677(5)(B) (1982 & Supp. III 1985), which lists among the domestic subsidies the following:

(i) The provision of capital, loans, or loan guarantees on terms inconsistent with commercial considerations.

(ii) The provision of goods or services at preferential rates.

(iii) The grant of funds or forgiveness of debt to cover operating losses sustained by a specific industry.

(iv) The assumption of any costs or expenses of manufacture, production, or distribution.

13. *Id.*

14. 48 Fed. Reg. at 24,167.

15. 19 U.S.C. § 1677(5)(B)(i) (1982 & Supp. III 1985).

16. 48 Fed. Reg. at 24,167 n.3.

17. *Id.* at 24,167.

18. *Id.* at 24,168.

Moreover, Commerce decided that even if the term "assumption" in subsection (iv) were interpreted broadly, the available information in the record of these investigations indicated that Canadian stumpage programs did not effectively reduce production costs. In making this determination, Commerce rejected petitioner's argument that Canadian stumpage prices should be compared with prices for stumpage in the United States. Such cross-border comparisons were inconsistent with the Department's general policy. Moreover, Commerce believed that such comparisons would be arbitrary and capricious for several reasons. First, Commerce noted substantial differences between U.S. and Canadian stumpage with regard to species combination, density, quality, size, age, accessibility, terrain, and climate. Second, it noted that additional payments were required of stumpage users by many provinces in Canada, but not in the U.S. Third, it noted the different practice in the U.S. with respect to stumpage in U.S. national forests, which was bid upon anywhere from two to five years in advance of being cut. In these circumstances, the bid price failed to take into account any subsequent fluctuations in demand for lumber. Finally, Commerce noted that recently the U.S. Forest Service had restricted the supply of timber in certain national forests because of budgetary and environmental restraints.[19]

Finally, Commerce concluded that the residual valuation method of pricing timber—used, for example, in British Columbia, the largest source of Canadian stumpage—could not be said *not* to reflect "true market value," as petitioner maintained. Accordingly, Commerce determined that the Canadian stumpage programs did not assume a cost of production.[20]

In Commerce's view in 1983, then, the Canadian stumpage programs did not meet either the specificity or subsidy tests of section 771(5)(B) of the Act. Consequently, they did not confer countervailable subsidies.

II. Other Early "Specificity" and "Preferentiality" Decisions

In 1983 Commerce made a few other significant decisions covering some of the key points made in the *Lumber* cases. In *Anhydrous and Aqua Ammonia from Mexico*[21] (*Ammonia*), *Carbon Black from Mexico*[22] (*Carbon Black*), and *Portland Hydraulic Cement and Cement Clinker from Mexico*[23] (*Cement*), various U.S. petitioners complained that their Mexican competitors could buy natural gas, petroleum feedstock, and heavy

19. *Id.*
20. *Id.*
21. 48 Fed. Reg. 28,522 (Dep't Comm. 1983) (final determination).
22. 48 Fed. Reg. 29,564 (Dep't Comm. 1983) (final determination).
23. 48 Fed. Reg. 43,063 (Dep't Comm. 1983) (final determination).

fuel oil, respectively, at prices far below those available in the United States. Because these inputs accounted for a high proportion of the end product's value, the Mexican ammonia, carbon black, and cement producers' costs of production were substantially lower than those across the border in the U.S.[24]

In each case, Commerce found no subsidy based solely upon the lower prices in Mexico than in the U.S. for ammonia, petroleum feedstock, and heavy fuel oil. Using the same type of analysis as in the *Lumber* cases, Commerce determined that the issue was whether a good was provided at a preferential rate. In the *Ammonia* case Commerce found that Petroleos Mexicanos (PEMEX), the monopoly ammonia producer in Mexico, paid more for natural gas than other industrial users in Mexico.[25] In the *Carbon Black* case Commerce found that all Mexican industrial users could obtain petroleum feedstock at the same price, so there was no preference within the meaning of subsection 771(5)(B)(ii) of the Act.[26] In the *Cement* case Commerce again found that all domestic users of heavy fuel oil in Mexico could obtain it at the same price. Therefore, the fuel oil was not provided "at a preferential rate."[27]

III. Judicial Decisions

The issues in these 1983 Commerce decisions spawned a series of suits before the Court of International Trade[28] involving the specificity and preferentiality tests.[29] In a 1983 case the court upheld Commerce's ap-

24. This information was asserted in the petition in each case. *See also* 48 Fed. Reg. at 28,524, 29,566 and 43,066, respectively.

25. 48 Fed. Reg. at 28,524.

26. 48 Fed. Reg. at 29,564. However, Commerce made an affirmative determination in that case, based in part on the carbon black producers' receipt of a 30% discount on their natural gas costs and electrical power rates, granted under the Plan Nacional de Desarollo Industrial to selected enterprises in certain regions. *Id.* at 29,566.

The facts of this case differed significantly from the other two Mexican natural resource cases, however, because there were only two Mexican carbon black producers concerned, and carbon black feedstock by definition was not used in Mexico by any other industry. In the *Ammonia* and *Cement* cases, by contrast, there were numerous other industries that used natural gas and heavy fuel oil. And in the *Cement* case, there were also numerous producers of cement. (In the *Ammonia* case, PEMEX was the monopoly producer.)

27. Tariff Act of 1930, as amended, § 771(5)(B)(ii), 19 U.S.C. § 1677(5)(B)(ii) (1982 & Supp. III 1985); 48 Fed. Reg. 43,063, 43,066 (Dep't Comm. 1983) (final determination). As in the *Carbon Black* case, Commerce found other subsidies, including subsidized export financing and domestic financing and tax benefits.

28. *See* Tariff Act of 1930, as amended, § 516A, 19 U.S.C. § 1516a (1982 & Supp. III 1985).

29. In the *Lumber* cases petitioner appealed Commerce's negative preliminary determinations (48 Fed. Reg. 10,395, as corrected at 48 Fed. Reg. 11,731), but did not challenge the decision in toto. Instead, petitioner challenged only Commerce's preliminary determinations that: (1) the Canadian federal and provincial governments' stumpage programs are

plication of the specificity test. In *Carlisle Tire & Rubber Co. v. United States*[30] the court approved Commerce's interpretation of "bounty or grant" in section 303 of the Act[31] as connoting some special or comparative advantage conferred on an industry or industry group.[32] Judge Maletz rejected the domestic industry's argument that "benefits from government programs are countervailable even if they are generally available on a nonpreferential basis."[33] The court required that "at a minimum either a regional or industry preference [must] be present in order for a bounty or grant to exist."[34] In addition, the court concluded that the U.S. petitioner's view would lead to countervailing duties on all generally available government benefits, such as public highways or universal tax credits, a result the court considered absurd.[35] The court concluded that the administrative burden of countervailing widely available benefits would be overwhelming, not merely inconvenient.[36] And it felt administration of the countervailing duty law would become arbitrary because the dollar

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not directed to a specific industry or group of industries; and (2) an assumption of cost as defined by 19 U.S.C. § 1677(5)(B)(iv) requires the relief by a foreign government of a preexisting statutory or contractual obligation of an enterprise or industry. The court ruled that it lacked jurisdiction under § 516 of the Act to review Commerce's preliminary negative determination, when: (1) petitioner did not challenge the determination itself, but two of four discrete grounds for that determination; and (2) the determination would continue to stand on the basis of the remaining, unchallenged grounds, even if the grounds in question were struck down. U.S. Coalition for Fair Canadian Lumber Imports v. United States, 563 F. Supp. 838 (Ct. Int'l Trade 1983). Petitioner did not later appeal Commerce's negative final determinations (48 Fed. Reg. 24,159).

30. 564 F. Supp. 834 (Ct. Int'l Trade 1983).

31. 19 U.S.C. § 1303 (1982 & Supp. III 1985), which applied in all countervailing duty investigations of products from Mexico prior to Mexico's conclusion in 1985 of an agreement on subsidies "substantially equivalent" (within the meaning of Tariff Act of 1930, as amended, § 701(b)(2), 19 U.S.C. § 1671(b)(2) (1982 & Supp. III 1985)) to obligations under the GATT "Subsidies Code" (Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade, Apr. 12, 1979, 31 U.S.T. 513, T.I.A.S. No. 9619). *See* U.S.-Mexico Agreement Relating to Subsidies, Apr. 23, 1985.

32. 564 F. Supp. at 838.

33. *Id.* at 837. The benefits in this case were generally available tax deductions for accelerated depreciation of equipment.

34. *Id.* at 838 (citing, inter alia, ASG Indus., Inc. v. United States, 610 F.2d 770 (C.C.P.A. 1979); ASG Indus., Inc. v. United States, 467 F. Supp. 1200 (Cust. Ct. 1979); Michelin Tire Corp. v. United States, 2 Ct. Int'l Trade 143 (1981); Macalloy Corp. v. United States, 1 Ct. Int'l Trade 199 (1981)).

35. 564 F. Supp. at 838. The court declared:

> [A]doption of Carlisle's literal view that generally available benefits are a bounty or grant would, if taken to its logical extreme, lead to an absurd result. Thus, included in Carlisle's category of countervailable benefits would be such things as public highways and bridges, as well as a tax credit for expenditures on capital investment even if available to all industries and sectors. . . . To suggest, as Carlisle implicitly does here, that almost every import entering the stream of American commerce be countervailed simply defies reason.

Id.

36. *Id.*

value of widely available benefits to any given industry could not be calculated accurately.[37]

In a 1984 case, however, the same court, in dictum, rejected the proposition "that, as a rule, generally available benefits are not subsidies."[38] In *Bethlehem Steel Corp. v. United States*[39] the court remarked, "[T]here is no reason why a particular benefit cannot be extended without limitation" and still be countervailable.[40] Yet the *Bethlehem* court claimed to be in harmony with *Carlisle*.[41]

In 1985 the court issued another decision following from *Bethlehem* rather than *Carlisle*. In *Agrexco (Agricultural Export Co.) v. United States*[42] the court reviewed inter alia a CVD decision by Commerce that benefits conferred by government research and development "do not confer subsidies when the research and development are provided for a wide range of disciplines and projects."[43] In fact, Commerce had found that the results were equally available worldwide, including to members of the petitioner trade association. However, citing *Bethlehem*, the court ruled that broad dissemination of the research and development results are immaterial where the research and development "is targeted to assist a particular, rather than a general industry."[44]

In 1985, in *Cabot Corp. v. United States*,[45] the court reviewed Commerce's 1983 *Carbon Black* decision and remanded the case to Commerce to redetermine whether Mexico's provision of carbon black feedstock and natural gas at government-set rates to the two Mexican carbon black producers conferred a countervailable subsidy. First, the court held that section 303 of the Act is unconcerned "with the nominal availability of a governmental program."[46] Instead, "the question is what aid or advantage has actually been received."[47]

The court noted Commerce's finding that the rate in Mexico charged for carbon black feedstock to carbon black producers was nonpreferential;

37. *Id.* The court stated: "Not only would accurate calculation of such benefits be difficult in the extreme, doing so in a reasoned and evenhanded manner would be next to impossible." *Id.*

38. Bethlehem Steel Corp. v. United States, 590 F. Supp. 1237, 1239 (Ct. Int'l Trade 1984).

39. *Id.*

40. *Id.* at 1242. The court further declared: "The idea that a subsidy can exist only by means of a specific designation or singling out of a favored group from the productive sector has no support in logic or law." *Id.*

41. *Id.* at 1246.

42. 604 F. Supp. 1238 (Ct. Int'l Trade 1985).

43. *Id.* at 1241.

44. *Id.* at 1241-42.

45. 620 F. Supp. 722 (Ct. Int'l Trade 1985).

46. *Id.* at 730.

47. *Id.*

any individual user in Mexico could purchase it and natural gas at the same price, which was well below world market prices.[48] However, the court distinguished between generally available benefits accruing generally to all citizens, and those actually accruing only to specific individuals or classes. The court stressed that even though some benefits may be generally *available,* their actual bestowal may nonetheless constitute specific grants to specified, identifiable entities. The court held: "The appropriate standard focuses on the *de facto* case by case effect of benefits provided to recipients rather than on the nominal availability of benefits."[49]

In dictum, the court continued to criticize Commerce's treatment of the subsidy issue in the *Carbon Black* case as well. The court expressed its view that the absence of a preference among purchasers of carbon black feedstock within Mexico did not necessarily preclude Commerce from finding that a subsidy had been conferred. Even if the prices charged were nondiscriminatory among domestic purchasers, a bounty, grant, or subsidy could still be found within the meaning of section 303 or section 771(5)(B).[50]

IV. Commerce's Administrative Review of *Carbon Black*

While the U.S. Government was still appealing the Court of International Trade's *Cabot* ruling,[51] Commerce proceeded with the first administrative review of its *Carbon Black* order.[52] In that review, Commerce reaffirmed its earlier position with respect to natural gas priced in Mexico

48. *Id.* at 731. The court noted that discounts were provided to enterprises located within specified regions. *Id.* Commerce had already found such regional benefits countervailable. Carbon Black from Mexico, 48 Fed. Reg. 29,564, 29,566 (Dep't Comm. 1983) (final determination).

49. 620 F. Supp. at 732.

50. *Id.* at 732-33. However, the court also rejected plaintiff's argument that any price below the world market price is per se a countervailable benefit. The court noted that the availability of inputs at lower prices could result from noncountervailable factors such as comparative advantage, excess supply, or low production costs. *Id.* at 733 n.9.
The government appealed the Court of International Trade's *Cabot* decision to the Court of Appeals for the Federal Circuit, which dismissed it. Cabot Corp. v. United States, 788 F.2d 1539 (Fed. Cir. 1986). The government challenged the lower court's rejection of Commerce's "generally available benefits" standard and substitution of a "competitive advantage" standard for what constitutes a countervailable bounty or grant. *Id.* at 1541. Cabot Corporation, the petitioner in the Commerce investigation, claimed that appeal was premature (in the absence of an interlocutory certification) because the lower court order required further action by Commerce prior to final action by the court. *Id.* The appeals court agreed, and concluded that the CIT order was not a final appealable order. *Id.* at 1544.

51. 620 F. Supp. 722 (Ct. Int'l Trade 1985).

52. Carbon Black from Mexico, 51 Fed. Reg. 13,269 (Dep't Comm. 1986) (prelim. admin. review). This preliminary review was published on April 18, 1986, only nine days after the Federal Circuit dismissed the government's appeal. The U.S. Government considered the court's remand order for a "redetermination" effectively implemented through its preliminary administrative review. The court agreed, and on this basis vacated its order.

below "world market" prices. It noted that there are many actual users of natural gas in a wide variety of industries.[53]

Nevertheless, Commerce reconsidered its earlier decision that prices within Mexico for carbon black feedstock below "world market" prices do not confer a subsidy because the feedstock is generally available and the prices are not preferential. Commerce stressed that in fact, there was only one industrial use for carbon black feedstock (to make carbon black) and only two users. In these circumstances, Commerce preliminarily determined that it had "placed excessive emphasis" on the fact that the only limitations on sales of an input were due to the inherent nature of the input and the level of applicable technological advancement, rather than to governmental action.[54] Instead, it determined that with respect to carbon black feedstock, there are too few users to support a finding that the feedstock is provided on a generally available basis.[55]

For these reasons, Commerce felt compelled to use alternative methods to determine whether that product was provided at a preferential rate. Commerce included a "Preferentiality Appendix" to its preliminary review, describing and ranking suitable alternative methods.[56] Commerce's "first choice" remains comparing the price charged to various recipients within the country concerned. Where (as here) the recipients are too few, however, Commerce's first "fallback" is to review prices charged by the *same* seller for a *similar* or related good. Appropriately adjusted, such prices can serve as a benchmark for measuring preferentiality with respect to sales of the input under consideration. Based upon expert testimony, Commerce determined that the prices charged by PEMEX for heavy fuel oil No. 6—appropriately adjusted—serve as an effective benchmark for measuring any preferentiality in PEMEX's prices for carbon black feedstock. On this basis, Commerce preliminarily found that such feedstock is not provided to Mexican carbon black producers at a preferential rate.[57]

While Commerce did not resort to any other method of determining preferentiality in this case, the "preliminary" Preferentiality Appendix lists three other possible approaches, in the following tentative order. If Commerce finds the two above-described tests inappropriate in a given case, its next recourse generally is to compare the price charged for the good or service concerned with the prices charged within the relevant jurisdiction by *other* sellers for an *identical* good or service. The next

53. *Id.* at 13,271.
54. *Id.*
55. *Id.*
56. *Id.* at 13,272-73.
57. *Id.* at 13,271.

fallback for determining preferentiality is to compare the price charged for the product or service concerned with the cost of providing the good or service. Finally, the "least desirable" method for determining preferentiality is to compare the price charged for the product or service considered with prices paid for the same product or service *outside* the relevant jurisdiction (*e.g.*, in the U.S.), in a market that resembles as closely as possible the market in question.[58]

V. Commerce's Lumber Preliminary Determinations

On May 19, 1986, the Coalition for Fair Lumber Imports filed a new countervailing duty petition complaining that Canada subsidizes softwood lumber products[59] and that imports of those products cause or threaten material injury to a U.S. industry.[60] In June 1986 the International Trade Commission again preliminarily found injury to a U.S. industry.[61] This time, however, Commerce preliminarily found subsidies of fifteen percent ad valorem, including subsidies bestowed under the provincial stumpage programs. Commerce determined that a subsidy within the meaning of section 771(5)(B) was provided to a specific group of industries. Regarding the specificity test, Commerce decided to reexamine Canadian provincial stumpage programs despite its 1983 determinations, in light of new evidence presented by the petitioner and the petitioner's contention that there had been an evolution in the Department's interpretation of the law.[62]

Regarding the specificity test, Commerce said it "continues to adhere to the position that specificity is a prerequisite for a domestic subsidy. . . ."[63] The Department noted that in its six years of administering the CVD law,[64] it has found that the specificity test cannot be reduced to a "precise mathematical formula."[65] Instead, the determination whether "specificity" exists requires the exercise of judgment and a balance of various factors, including: (1) the extent to which a foreign government acts to limit a program's availability; (2) the number of enterprises, industries, or groups that actually use a program, and the extent to which each uses a program; and (3) the extent to which the government exercises discretion in making the program available.

58. *Id.* at 13,273.
59. The products complained of this time were softwood lumber, siding, and flooring.
60. Petition of the Coalition for Fair Lumber Imports (May 19, 1986) (Dep't Comm.).
61. Softwood Lumber from Canada, USITC Pub. 1874, Inv. No. 701-TA-274, (June 1986).
62. Certain Softwood Lumber Products from Canada, 51 Fed. Reg. 37,453 (Dep't Comm. 1986) (prelim. determination).
63. *Id.* at 37,455.
64. *See supra* note 3.
65. 51 Fed. Reg. at 37,456.

In the instant investigations, Commerce said that it had received inadequate responses to its questions about the specificity of the provincial stumpage programs. On the basis of the best information available, therefore, it determined that the specificity requirements of section 771(5)(B) of the Act were satisfied.[66] In making this determination, Commerce relied upon the Canadian governments' exercise of "considerable discretion" regarding the allocation of stumpage rights and significant evidence of the disproportionate receipt of stumpage rights.[67] Commerce also noted that the furniture manufacturing industry—cited in 1983 as one of at least three groups of industries benefiting from stumpage rights—owned negligible rights, if they owned any at all. It also noted that the lumber and pulp and paper industries "tend to be horizontally integrated into single enterprises,"[68] and share the same trade associations. Commerce noted that these facts call into question its view in 1983 that the lumber industry and the pulp and paper industry represent at least two different groups of industries.[69] Finally, Commerce noted that its previous reliance on Standard Industrial Classification codes may have been misplaced in light of the integration and concentration of production between the lumber and pulp and paper industries.[70]

Having determined (on the basis of best information available) that Canadian provincial stumpage benefits were provided to a specific industry or group of industries, Commerce next reviewed whether those benefits were subsidies within the meaning of section 771(5)(B)(ii) of the Act. In deciding whether the raw timber was provided at a preferential rate, Commerce noted its preferred test for determining preferentiality, a comparison of the prices charged within the jurisdiction. However, Commerce said that it lacked adequate information to determine whether there is price discrimination by the provincial governments of British Columbia and Alberta.[71]

Commerce then rejected its first "fallback" method of determining preferentiality, prices charged by the government for a similar or related good. It said that the only good similar to softwood stumpage was hardwood stumpage, which is limited to the same group of users.

66. *Id.* at 37,456; *see* Tariff Act of 1930, as amended, § 776(b), 19 U.S.C. § 1677e (1982 & Supp. III 1985), which authorizes Commerce to use "the best information otherwise available" if a party "refuses or is unable to produce information requested in a timely manner and in the form required, or otherwise significantly impedes an investigation. . . ."

67. 51 Fed. Reg. at 37,456.

68. *Id.*

69. *Id.*

70. *Id.*

71. While there are some competitively bid sales in those provinces, Commerce was not satisfied that the products were truly comparable. Moreover, it noted that government limits on supply and demand may render the competitively bid prices meaningless in any event. *Id.*

Commerce next considered its second alternative test, prices charged within the jurisdiction by other sellers for an identical good. It concluded that this test was equally inappropriate in these cases, in the absence of significant private price information.

Commerce preliminarily adopted its third alternative test for preferentiality, a comparison of stumpage prices with the government's cost of producing the good. Based upon the information in the record of these investigations, Commerce preliminarily determined that Alberta, British Columbia, Ontario, and Quebec do not recover the costs of providing standing timber to stumpage holders, and that their expenditures directly related to commercial timber harvesting exceed directly related revenues. On this basis, they preliminarily made an affirmative determination with respect to Canadian provincial stumpage programs.

Under the time limits established in the Act,[72] Commerce's final determination was due December 30, 1986. If it had been affirmative, the International Trade Commission's final injury determination would have been due within forty-five days thereafter.[73]

VI. The U.S.-Canada Lumber Agreement

On the same day that final subsidy determinations were due, however, the United States and Canada concluded a memorandum of understanding under which Canada agreed to collect a tax of fifteen percent ad valorem on certain softwood products made on or after January 8, 1987,[74] and exported to the U.S.[75]

72. Tariff Act of 1930, as amended, § 735(a)(1), 19 U.S.C § 1671d(a)(1) (1982 & Supp. III 1985).

73. Tariff Act of 1930, as amended, § 735(b)(2), 19 U.S.C. § 1671d(b)(2) (1982 & Supp. III 1985).

74. From Dec. 30, 1986, to Jan. 8, 1987, the U.S. collected a temporary import tax of 15% ad valorem on such imports from Canada under the authority of the Trade Act of 1974, as amended, § 301, 19 U.S.C. § 2411 (1982). Proclamation No. 5595, 52 Fed. Reg. 229 (1987). This action was based upon the President's finding that Canada's inability to collect an export charge of that amount during that time period was unjustifiable or unreasonable and a burden or restriction on U.S. commerce. Determination under Section 301 of the Trade Act of 1974, Memorandum of Dec. 30, 1986, for the Secretary of Commerce and the United States Trade Representative, 52 Fed. Reg. 231 (1987). In a separate determination under § 301 on the same day, in view of the "critical importance" of the fulfillment of the objectives and commitments in the U.S.-Canada lumber agreement, the President directed the Secretary of Commerce to determine periodically whether Canadian federal and provincial governments are fully imposing the export charge. Determination under Section 301 of the Trade Act of 1974, Memorandum of Dec. 30, 1986, for the Secretary of Commerce, 52 Fed. Reg. 233 (1987). The President declared that if the Secretary of Commerce determines that such export charges are not being fully imposed, then the President "will take action . . . to offset any shortfall." *Id.*

75. However, in an appendix to the memorandum of understanding, the two governments excluded from the agreement the same companies that Commerce had preliminarily excluded

The agreement was expressly contingent on the withdrawal of the countervailing duty petition and Commerce's termination of the investigations, which was done on December 30, 1986.[76] The agreement provided that it is "without prejudice" to the position of either Government as to whether the stumpage programs and practices of Canadian governments constitute subsidies under United States law or any international agreement."[77]

Under the agreement, Canada may reduce or eliminate the export charge to the extent the provinces increase stumpage or other charges.[78] However, Canada does not undertake to modify its stumpage charges or practices. Canada does agree to: "take no action, and . . . [to] take all reasonable steps to ensure that no other governmental body in Canada takes any action, directly or indirectly, which has the effect of offsetting or reducing the export charge or replacement measures, except as provided in this Understanding."[79]

VII. The Significance of the Lumber Agreement

The lumber agreement and the developments leading to it are significant for several reasons. First, the evolution of the CVD law in general and of the specificity and subsidy tests in particular reflect Commerce's and the court's intellectual honesty and openmindedness in interpreting and applying the CVD law. The Department has shown that it is willing to reconsider issues if interested parties marshall appropriate information and arguments warranting reconsideration.

Second, the litigation spawned by the 1983 Commerce decisions on natural resources demonstrates the importance and effectiveness of the substantially increased judicial review provisions enacted by the Congress in 1979.[80] Congress intended to provide more opportunities for judicial review, in large part as a check on Executive Branch discretion in administering the countervailing duty and antidumping laws.[81] Recently the

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from its countervailing duty investigations based upon their receipt of no subsidies. Memorandum of understanding para. 3(d).

76. Termination of an investigation is authorized by Tariff Act of 1930, as amended, § 704(a)(1), 19 U.S.C. § 1671c(a)(1) (1982 & Supp. III 1985). Under the Act and the agreement (para. 3(c)), Commerce's termination resulted in a release of all bonds and refund of all deposits made pursuant to the preliminary determination. *See* Certain Softwood Lumber Products from Canada, 52 Fed. Reg. 315 (Dep't Comm. 1987) (termination).

77. Para. 3(b) of the U.S.-Canada Memorandum of Understanding on Trade in Certain Softwood Lumber Products.

78. *Id.*, para. 5(a).

79. *Id.*, para. 6.

80. Trade Agreements Act of 1979, § 1001-02, Pub. L. No. 96-39, 93 Stat. 144, 300-07 (codified as amended at 19 U.S.C. §§ 2112 & 2581 (1982)).

81. *See generally* I.M. DESTLER, AMERICAN TRADE POLITICS: SYSTEM UNDER STRESS (1986); Koh, *Congressional Controls of Presidential Trade Policymaking After I.N.S. v. Chadha*, 18 N.Y.U. J. INT'L L. & POL. 1191, 1205-06 (1986).

courts have played a significant role in shaping the course of the CVD law. At least theoretically, this should reduce the pressure that disappointed U.S. petitioners attempt to apply to the Congress to amend the law whenever Commerce makes any determination adverse to their interests.[82]

Third, the lumber agreement demonstrates that governments frequently prefer a negotiated solution to a significant trade problem than unilateral action by one government. Particularly with the discussions of a free trade area agreement pending between the United States and Canadian governments, a less confrontational handling of this long-lived problem probably better served the interests of both parties.

Finally, the lumber agreement reflects that truly "big" cases occasionally are resolved prior to final Commerce or ITC determinations. In this respect the agreement follows in the footsteps of the 1982 carbon steel antidumping and countervailing duty cases against European Communities Member States,[83] and the recent U.S.-Japan Arrangement Regarding Trade in Semiconductor Products.[84]

82 For example, numerous proposals to establish legislatively a "natural resource subsidy" resulted from the 1983 Commerce decisions and criticism of them by some U.S. industries and members of Congress. *See, e.g.*, H.R. 4784, 98th Cong., 2d Sess., 130 CONG. REC. H7904, H7952-53 (daily ed. July 26, 1984); H.R. 1950, 99th Cong., 1st Sess. § 502, 131 CONG. REC. H1900 (daily ed. April 3, 1985); H.R. 2345, 99th Cong., 1st Sess., 131 CONG. REC. H2841 (daily ed. May 2, 1985); and H.R. 2451, 99th Cong., 1st Sess., 131 CONG. REC. H3098 (daily ed. May 9, 1985).

83. These cases likewise culminated in a government-to-government agreement based upon the withdrawal by petitioners of all their petitions. *See* Certain Steel Products from Belgium, France, the Federal Republic of Germany, Italy, Luxembourg, the Netherlands and the United Kingdom, 47 Fed. Reg. 49,058 (Dep't Comm. 1982) (termination); and Arrangements Concerning Steel Products, Oct. 21, 1982.

84. Signed Sept. 2, 1986, 25 I.L.M. 1408 (1986). This agreement involved a case under § 301 of the Trade Act of 1974, as amended, 19 U.S.C. § 2411 (1982) (*see* Memorandum for the United States Trade Representative, Determination under Section 301 of the Trade Act of 1974, 51 Fed. Reg. 27,811 (1986), 52 Fed. Reg. 13,412 (1987)), and two dumping cases (Erasable Programmable Read Only Memory Semiconductors from Japan, 51 Fed. Reg. 28,253 (Dep't Comm. 1986) (suspension); and Dynamic Random Access Memory Semiconductors of 256 Kilobits and Above from Japan, 51 Fed. Reg. 28,396 (Dep't Comm. 1986) (suspension)).