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Lumber Imports From Canada: Issues and Events

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SUMMARY

U.S. lumber producers have raised concerns about softwood imports from Canada many years. Alleged Canadian subsidies (a prerequisite for establishing countervailing duties — CVDs) were investigated in 1982, 1986, and 1992. No subsidies were found in 1983. Preliminary subsidy findings led to a 1986 Memorandum of Understanding (with a 15% Canadian tax on lumber exported to the United States), and to a 6.51% CVD in 1992. The 1992 CVD was challenged under the U.S.-Canada Free Trade Agreement, and was terminated in 1994. A 1996 Softwood Lumber Agreement (SLA) restricted lumber exports to the United States for 5 years, until March 31, 2001. (See CRS Report RL30826.)

U.S. Industry Arguments. The U.S. producers argue that they have been injured by Canadian subsidies, especially for provincial "stumpage fees" (for the right to harvest trees). In Canada, the provinces own 90% of the timberlands; this contrasts with the United States, where 42% of timberlands are publicly owned and where government timber is often sold competitively. These differences in land tenure make comparisons difficult.

In addition, U.S. lumber producers argue that log export restrictions in Canada subsidize Canadian producers by preventing other producers from getting direct access to Canadian timber. U.S. log exports from federal and state lands are also restricted, but logs can be exported from U.S. private lands. Canada has argued in the WTO that U.S. treatment of export restrictions as a subsidy violates the WTO Agreement on Subsidies and Countervailing Measures (SCM).

Finally, U.S. producers argue that they have been injured by imports of Canadian softwood lumber. They point to the significant growth in Canadian exports and market share, from less than 3 billion board feet (BBF) and 7% of the U.S. market in 1952 to more than 18 BBF annually since 1998 and a market share of more than 33% since 1995. Canadians counter that the U.S. industry has been unable to satisfy the growth in demand. U.S. homebuilders and other lumber users assert that Canadian lumber is needed to satisfy U.S. demands.

Current Issues. In response to petitions, the Department of Commerce initiated CVD and antidumping investigations on April 30, 2001. Final Commerce determinations on March 22, 2002, were subsidies of 19.34% and average dumping margins of 9.67%. On May 2, the ITC voted 4-0 that imports had caused injury to the U.S. industry. This led the Commerce Department to publish its final countervailing duty order, initiating duties averaging 29%, on May 22, 2002. Canada has requested binational panel reviews, under Chapter 19 of NAFTA, of these findings.

Canada has filed five WTO cases against the United States in connection with softwood lumber issues. In August 2001, the WTO adopted a panel report finding that U.S. treatment of export restrictions as a subsidy violates the SCM Agreement; the panel did not recommend remedial action since such treatment is not mandatory. A July 15, 2002, panel report upheld a U.S. law creating an administrative procedure for complying with WTO decisions involving antidumping and CVD determinations. Three cases involve challenges of U.S. actions in the softwood lumber investigations themselves. A preliminary mixed decision has been issued in one case; Canada has requested a panel in the second; the third is in consultations.

MOST RECENT DEVELOPMENTS

On May 22, 2002, the Department of Commerce issued its final countervailing duty order assessing countervailing duties of 19.34% ad valorem *(as a percent of lumber values), and anti-dumping margins averaging 9.67% on Canadian lumber exports. Canada has requested binational panel reviews of the subsidy and injury determinations, in accordance with Chapter 19 of NAFTA, and the panels are expected to report by February 11, 2003. On July 15, 2002, a WTO panel upheld U.S. procedures for complying with WTO decisions. In three separate cases, Canada is challenging the U.S. investigations; a preliminary panel report in July 2002 led to a mixed decision in one, a panel has been requested in a second, and consultations are continuing in a third case.*

BACKGROUND AND ANALYSIS

Concerns among U.S. lumber producers about softwood lumber imports from Canada have been raised for decades; the current dispute has persisted for at least 20 years. U.S. producers argue that they have been harmed by unfair competition, which they assert results from subsidies to Canadian producers, primarily in the form of low provincial stumpage fees (the fees for the right to harvest trees from Province-owned timberlands) and Canadian restrictions on log exports. Canadians defend their system, and U.S. homebuilders and other lumber users advocate unrestricted lumber imports. This issue brief provides a concise historical account of the dispute, summarizes the subsidy and injury evidence, and discusses the current issues and events. (For more historical background and analysis, see CRS Report RL30826.)

Historical Background

The current dispute began in 1981, when letters from Members of Congress and a petition from the U.S. lumber industry asked the U.S. Department of Commerce (DOC) and the U.S. International Trade Commission (ITC) to investigate lumber imports from Canada for a possible countervailing duty (CVD).[1] The ITC found preliminary evidence of injury to the U.S. industry, but in 1983, the DOC's International Trade Administration (ITA) determined that subsidies were *de minimis* (less than 0.5%), ending the CVD investigation.

In 1986, the U.S. lumber industry filed a petition for another CVD investigation with the DOC and the ITC. A 1985 court ruling on an ITA determination of countervailable benefits on certain imports from Mexico was seen as a favorable precedent for reversing the ITA finding on Canadian lumber subsidies. The ITC again found preliminary evidence of injury to the U.S. industry, and the ITA reversed its 1983 determination, with a preliminary finding that Canadian producers received a subsidy of 15% *ad valorem* (*i.e.*, 15% of lumber

[1] U.S. trade law (19 U.S.C. 1671-1671h) authorizes countervailing duties on imported goods, if the DOC determines that the imports are being subsidized (directly or indirectly) by a foreign country and if the ITC determines that the imports have materially injured a U.S. industry. The duty is set at the calculated level of the subsidies.

market prices). On December 30, 1986, the day before the final ITA subsidy determination, the United States and Canada signed a Memorandum of Understanding (MOU), with Canada imposing a 15% tax on lumber exported to the United States, to be replaced by higher stumpage fees within 5 years. This agreement led the U.S. industry to withdraw its petition.

In September 1991, the Canadian government announced that it would withdraw from the MOU, because most of the provinces had increased their stumpage fees. The U.S. Trade Representative (USTR) responded by beginning a §301 investigation,[2] pending completion of a new CVD investigation by the ITA and the ITC. In March 1992, the ITA issued a preliminary finding of 14.48% *ad valorem* subsidies, with a final determination in May establishing a 6.51% *ad valorem* subsidies, leading to a 6.51% *ad valorem* duty. This was confirmed in July with a final ITC finding that the U.S. industry had been injured by Canadian lumber imports.

The Canadian federal government appealed both the ITA and the ITC final findings to binational review panels under the U.S.-Canada Free Trade Agreement (FTA), which was signed on January 2, 1988. In May 1993, the binational subsidy panel remanded the ITA finding for further analysis, and in September, the ITA revised its finding to 11.54% *ad valorem* subsidies. In December, the binational subsidy panel again remanded the ITA finding and ordered the ITA to find no subsidies. In January, the ITA complied with the order. Using a provision of the FTA, the USTR requested an Extraordinary Challenge Committee (ECC) to review the binational panel decisions, but the ECC was dismissed in August 1994 for failing to meet FTA standards. In August, the DOC revoked the CVD, and in October, the USTR announced that it would terminate the §301 action.

Two events in September 1994 induced Canada to negotiate restrictions on its lumber exports to the United States. First, the U.S. lumber industry filed a lawsuit challenging the constitutionality of the FTA review process. Second, the Uruguay Round Agreements Act (URAA; P.L. 103-465) explicitly approved the President's "statement of administrative action" (SAA) that had accompanied his proposed legislation; the SAA stated that, because of Canadian practices, lumber imports from Canada could be subject to a CVD. In February 1996, the two nations announced an agreement-in-principle — a fee on Canadian lumber exports to the United States in excess of a specified quota for 5 years — with the final U.S.-Canada Softwood Lumber Agreement (SLA) signed in May and retroactive to April 1, 1996. The SLA was effective through March 31, 2001.

Analysis: Subsidies and Injury

Annual Canadian lumber imports have risen from less than 3 billion board feet (BBF), about 7% of the U.S. market, in the early 1950s to more than 18 BBF, more than a third of the U.S. market, in the late 1990s. U.S. lumber producers argue that subsidies to Canadian producers give them an unfair advantage in supplying the U.S. market and that this has injured U.S. producers. These two issues — subsidies and injury — are the basis in U.S. trade law for determining if a CVD is warranted. In addition, "critical circumstances" —

[2] Under §301 of the Trade Act of 1974 (19 U.S.C. 2411-2420), the USTR can investigate and can respond, with a broad range of feasible actions, to foreign trade practices which are found to be illegal, unreasonable, or discriminatory, and are burdensome to U.S. interests.

which allow for retroactive duties — are deemed to exist, if imports rise significantly after ending import restrictions. Finally, dumping — selling imports at less than the cost of their production — can lead to additional duties.

Subsidies: Canadian Stumpage Fees. The U.S. lumber industry has argued that the stumpage fees charged by the Canadian provinces are less than the market price of the timber would be and are therefore a subsidy to Canadian producers. About 90% of the timberlands in the 10 provinces are owned by the provinces. The provinces require management plans for forested areas and allocate the timber harvests through a variety of agreements or leases, often for 5 or more years with renewal options. Stumpage fees for the timber are determined administratively, often with adjustments to reflect changes in market prices for lumber. This contrasts with the U.S. situation, where 42% of the forests are publicly owned and where public timber is typically sold in competitive auctions; thus, much of the timber in the United States is sold by public and private landowners at market prices.[3] The use of administered fees in Canada opens the possibility that the Canadian system results in transfers to the private sector at less than their fair market value, as the U.S. lumber industry has charged. However, comparisons of U.S. and Canadian stumpage fees are often disputed, because of: differences in measurement systems and the imprecision of converting Canadian cubic meters of logs to U.S. board feet of lumber; differences in the diameter, height, quality, and species mix of U.S. and Canadian forests; differences in management responsibilities imposed on timber buyers (e.g., road construction, reforestation); differences in environmental conditions and policies; and other factors.

Subsidies: Export Restrictions. Export restrictions by British Columbia (BC) were identified as a subsidy to BC lumber producers by the ITA in its 1992 CVD investigation. BC generally prohibits the export of logs from Crown (provincial) lands, to assure domestic production, provide jobs, and encourage economic development. Export restrictions on public timber in the United States indicate substantially higher prices for export logs than for comparable logs sold domestically. Most economists would consider restrictions that reduce domestic prices below the world market price to be subsidies, and the General Agreement on Tariffs and Trade (GATT) generally prohibits export restrictions. In addition, current U.S. trade law allows the DOC to consider an export restraint on a product to be a subsidy if the private parties who would be exporting the product provide the restrained good to domestic purchasers for less than adequate remuneration. Nonetheless, Canada challenged the ITA treatment of export restrictions as a subsidy, arguing that this treatment is inconsistent with the World Trade Organization (WTO) Agreement on Subsidies and Countervailing Measures. This challenge is discussed more below.

Injury to the U.S. Lumber Industry. Proving injury or threat of injury to U.S. lumber producers is also essential to establishing a CVD. The share of the U.S. softwood lumber market provided by Canadian lumber has grown substantially over the past 50 years. In 1952, lumber imports from Canada were less than 3 BBF, and Canada's market share was less than 7%. In 1998 and 1999, Canadian lumber imports were more than 18 BBF, and

[3] Some argue that U.S. federal agencies are not comparable to traditional, market-oriented private "willing sellers," because they do not make investments or sales based on profitability, as a private landowner presumably would. However, the U.S. federal government owns only 33% of U.S. timberlands, and thus probably has less impact on timber markets than do the Canadian provinces.

Canada's market share has fluctuated between 33% and 35% since 1995. These facts are cited by U.S. producers as evidence that Canadian imports have come at the expense of normal domestic growth in industrial lumber production. U.S. homebuilders and other lumber users counter that Canadian lumber is essential to meeting domestic demand, and argue for unrestricted imports. Despite consistent ITC findings of injury, indisputable proof of injury to U.S. producers is difficult to establish.

Current Issues and Events

Two aspects of this situation are currently the focus of attention in this long-running dispute over the exports of softwood lumber from Canada to the United States. One is the 2001-2002 countervailing and antidumping investigations. The other is the several WTO challenges by the Canadians questioning the countervailing and antidumping investigative processes.

The 2001–2002 Countervailing and Antidumping Investigations. The 1996 U.S.-Canada Softwood Lumber Agreement expired on March 31, 2001. On April 2, the U.S. Coalition for Fair Lumber Imports filed antidumping and CVD petitions. On April 24, the DOC announced that it was initiating the antidumping and CVD investigations, because the petitioners had standing and had shown adequate industry support. On May 16, the ITC issued its preliminary determination that there was "a reasonable indication that a U.S. industry is threatened with material injury by reason of imports of softwood lumber from Canada that are allegedly subsidized and sold in the United States at less than fair value" (Investigations Nos. 701-TA-414 and 731-TA-928 (Preliminary)). On August 17, the DOC published its preliminary determination of Canadian subsidies of 19.31% *ad valorem* (as a percent of sale value), and established a preliminary duty at that level. DOC also found that critical circumstances exist, allowing retroactive application of the duty. On November 6, the DOC published its preliminary determination that Canadian firms were dumping lumber, with margins ranging from 5.94–19.24% (12.58% for most firms). The DOC also announced it would align, and postpone until March 25, 2002, final determinations in the CVD and antidumping cases.

Negotiations were undertaken to forestall final determinations of injury, subsidy, and dumping. The negotiations collapsed on March 21, 2002, and on March 22, the DOC issued final determinations, with Canadian subsidies determined to be 19.34% *ad valorem*, and dumping margins ranged from 2.26–15.83% (9.67% for most firms). On May 2, by a 4-0 vote of the commissioners, the ITC issued a final finding of injury. Duties averaging 29% went into effect on May 22, when the DOC published the final duty notice in the *Federal Register*.

Canada and Canadian lumber producers have sought binational panel reviews of DOC final determinations in both the antidumping and countervailing duty cases, an option available under Chapter 19 of the North American Free Trade Agreement (NAFTA) in lieu of judicial review. The panels have been established to examine whether the DOC determinations are in accordance with U.S. antidumping and countervailing duty law; the panels' reports are due February 11, 2003.

Canadian WTO Challenges to U.S. Countervailing Duty and Antidumping Laws. The DOC recognized the countervailability of export restrictions in its 1992

determination of subsidies involving Canadian softwood lumber and in a 1990 determination of subsidies involving leather from Argentina. In the SAA accompanying the Uruguay Round Agreements Act (H.Doc 103-316, vol.1, pp. 925-926), and in the DOC's *Federal Register* explanation of its implementing rule (63 *Federal Register* 65349–65351, Nov. 25,1998), the Executive Branch confirmed that if it were again to investigate situations and facts similar to those in the two cases just described, U.S. trade law would continue to permit it to reach the same conclusion. Canada challenged this policy in the WTO, alleging that the U.S. interpretation, as set forth in those documents, is inconsistent with U.S. obligations under the WTO Agreement on Subsidies and Countervailing Measures (SCM). On August 23, the WTO adopted the final panel report in the case agreeing with Canada, that export restraints do not constitute a financial contribution from the government, and thus do not confer a countervailable subsidy under the SCM Agreement; however, the report recommended no remedial action, since U.S. law does not *require* the DOC to treat an export restraint as a subsidy and since there is no current U.S. measure based on such a finding.

In apparent anticipation of possible U.S. antidumping and CVD cases against Canadian softwood lumber imports, Canada filed another WTO complaint against the United States on January 17, 2001, challenging § 129(c)(1) of the URAA, which sets forth procedures for administrative compliance with adverse WTO panel reports involving U.S. antidumping or CVD measures. Canada alleged that § 129(c)(1) prohibits the United States from refunding estimated duties in trade remedy proceedings that are found to be inconsistent with WTO obligations and thus violates portions of the WTO Dispute Settlement Understanding and various WTO antidumping and countervailing duty obligations. A WTO panel was established in August 2001 to examine the complaint. The panel's report, circulated to all WTO Members July 15, 2002, concluded that the United States was not in violation of its WTO obligations since the law did not mandate a WTO-inconsistent result. Under WTO rules, the WTO Dispute Settlement Body must hold a meeting within 60 days to adopt the panel's report; the report will not be adopted at that time if Canada appeals.

On August 21, 2001, Canada requested consultations with the United States, claiming that DOC's preliminary subsidy and critical circumstances determinations in the softwood lumber CVD proceeding violated the SCM Agreement and the GATT 1994. Regarding the subsidy determination, Canada cited, among other things, DOC's treatment of stumpage as a financial contribution, inflation of the subsidy by calculating a country-wide rate based upon only a portion of Canadian exports to the United States, and measuring the adequacy of remuneration for timber that provincial governments sold to lumber producers by comparing stumpage prices in U.S. and Canadian markets, rather than by referring to prevailing market conditions in Canada alone (*see* 66 *Federal Register* 45724-45725, August 29, 2001). A dispute panel was established December 5, 2001, with panelists appointed February 1, 2002. An interim panel report issued to the disputing parties July 26, 2002, reportedly concludes in part that DOC's use of cross-border price comparisons violates the SCM Agreement, but upholds the U.S. determination that provincial stumpage programs constitute a financial contribution to the industry. While the panel reportedly also found that DOC's preliminary critical circumstances determination (allowing provisional duties) was improper, DOC revoked the finding in its final CVD determination. A final panel report is expected to be circulated in early September 2002, at which time parties will have 60 days to appeal.

On March 6, 2002, Canada requested consultations with the United States regarding the provisional antidumping measures imposed on Canadian lumber after DOC's affirmative preliminary dumping determination October 31, 2001. Canada is arguing that neither the initiation of the antidumping investigation nor the preliminary determination is in accord with the WTO Antidumping Agreement. The case remains in consultations. On May 3, 2002, Canada requested consultations with the United States on DOC's final subsidy determination in the softwood lumber CVD case. Canada requested a panel at a July 29, 2002, meeting of the WTO Dispute Settlement Body; while the United States blocked this initial panel request, WTO rules require that a panel be established at the next meeting that the request is made.

LEGISLATION

H.Con.Res. 45 (Kolbe)/S.Con.Res. 4 (Nickles)

Express the sense of Congress of the desirability of open trade in softwood lumber between the United States and Canada. H.Con.Res. 45 introduced February 28, 2001; referred to the House Ways and Means Committee. S.Con.Res. 4 introduced January 29, 2001; referred to the Senate Finance Committee.

H.Con.Res. 54 (Chambliss)/S.Con.Res. 8 (Snowe)

Express the sense of Congress that the Administration should resolve problems of unfairly traded Canadian lumber, and should make it the top trade priority. H.Con.Res. 54 introduced March 7, 2001; referred to the House Ways and Means Committee. S.Con.Res. 8 introduced February 7, 2001; referred to the Senate Finance Committee.

CHRONOLOGY

07/02 -- On July 15, a WTO panel upheld U.S. law for complying with WTO decisions.

05/02 -- On May 22, the DOC published its final countervailing duty order, with duties averaging 29%.

05/02 -- On May 3, Canada requested WTO consultations on whether U.S. final subsidy determination is consistent with the SCM Agreement.

05/02 -- On May 2, the ITC voted 4-0 that the U.S. lumber industry was injured by Canadian imports.

03/02 -- On March 22, the DOC announced final subsidy findings of 19.34% *ad valorem*, and final antidumping margins of 9.67% *ad valorem* for most Canadian firms.

03/02 -- On March 6, Canada requested consultations on whether U.S. antidumping investigation and preliminary determination are consistent with WTO Antidumping Agreement.

12/01 -- On December 5, a WTO dispute panel was established to hear Canada's complaint that the DOC's preliminary determinations in the softwood lumber CVD proceeding violate the SCM Agreement and the GATT 1994.

11/01 -- On November 6, the DOC announced its preliminary finding of Canadian lumber dumping, with margins of 12.58% for most firms, and the alignment of the antidumping and CVD cases, with the final finding postponed until March 25, 2002.

08/01 -- On August 23, the WTO adopted a panel report holding that U.S. treatment of export restraints as subsidies violated WTO agreements. Also on August 23, a WTO panel was established to examine Canada's complaint that a U.S. law prohibiting the refund of estimated duties in proceedings found to be inconsistent with WTO obligations also violated WTO agreements.

08/01 -- On August 21, Canada requested consultations with the United States in the WTO regarding the DOC's preliminary determinations in the CVD case.

08/01 -- On August 17, the DOC issued its preliminary finding of 19.31% *ad valorem* Canadian subsidies and of the existence of critical circumstances.

05/01 -- On May 16, the ITC issued its preliminary finding of injury to the U.S. lumber industry by Canadian lumber imports.

04/01 -- On April 2, the U.S. Coalition For Fair Lumber Imports filed antidumping and CVD petitions to restrict Canadian softwood imports. On April 24, the DOC announced the initiation of the antidumping and CVD investigations.

03/01 -- At midnight on March 31, the 1996 Softwood Lumber Agreement expired.

01/01 -- On January 17, Canada requests consultations with United States under WTO Dispute Settlement Understanding, arguing that U.S. procedures for administrative compliance with adverse WTO panel reports violate the Understanding.

09/00 -- WTO panel established to assess Canadian objection to U.S. treatment of export restrictions.

05/00 -- Canada requests consultations with United States under WTO Dispute Settlement Understanding, arguing U.S. treatment of export restrictions is inconsistent with WTO Agreement on Subsidies and Countervailing Measures.

06/99 -- U.S. Customs Service reclassifies rougher-headed lumber and notched studs as softwood lumber subject to the SLA.

12/98 -- U.S. Court of International Trade upholds Customs Service ruling that drilled studs are softwood lumber subject to the SLA.

06/98 -- U.S. Customs Service issues final decision reclassifying drilled studs as softwood lumber subject to the SLA.

02/97 -- U.S. Customs Service issues New York Ruling Letter B81564 classifying drilled studs as builders' joinery exempt from the SLA.

05/96 -- USTR and Canada sign Softwood Lumber Agreement (SLA), retroactive to April 1, 1996.

12/94 -- Negotiations begin between the USTR and Canada to restrict lumber imports.

10/94 -- USTR terminates §301 action against Canadian lumber imports.

08/94 -- ECC dismissed, and 2/94 binational subsidy panel order affirmed.

01/94 -- Binational subsidy panel orders ITA to find no subsidies; ITA complies.

10/93 -- ITC reanalysis confirms original finding of injury to U.S. industry.

09/93 -- ITA reanalysis confirms and revises final finding to 11.54% *ad valorem* subsidies by Canada.

07/93 -- Binational injury panel remands ITC analysis of injury for further analysis.

05/93 -- Binational subsidy panel remands ITA analysis of subsidies for further analysis.

08/92 -- Canada challenges ITA and ITC findings under the U.S.-Canada Free Trade Agreement (FTA), leading to binational panels to review the ITA finding of subsidies and ITC finding of injury.

07/92 -- ITC issues final finding of injury, confirming the CVD.

05/92 -- ITA issues final finding of subsidies, establishing the CVD at 6.51% *ad valorem*.

10/91 -- USTR initiates §301 action; ITA self-initiates a CVD investigation.

09/91 -- Canada announces it will withdraw from the MOU.

12/86 -- Canada and USTR announce a Memorandum of Understanding (MOU) with a 15% Canadian export tax instead of a CVD.

10/86 -- ITA issues preliminary finding of subsidies, setting a CVD at 15% *ad valorem*.

05/86 -- U.S. Coalition for Fair Lumber Imports files a CVD petition.

03/83 -- ITA issues preliminary finding of *de minimis* subsidies, ending CVD investigation.

10/82 -- U.S. lumber industry files petition requesting a CVD.

12/81 -- Letters from Members of Congress to USTR requesting a CVD investigation of lumber imports from Canada.

FOR ADDITIONAL READING

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