BEFORE THE
WORLD TRADE ORGANIZATION
APPELLATE BODY

United States - Final Countervailing Duty Determination With Respect to Certain Softwood Lumber Products from Canada

(AB-2003-6)

APPELLEE'S SUBMISSION OF THE UNITED STATES OF AMERICA

November 5, 2003

BEFORE THE
WORLD TRADE ORGANIZATION
APPELLATE BODY

United States - Final Countervailing Duty Determination With Respect to Certain Softwood Lumber Products from Canada

(AB-2003-6)

SERVICE LIST

OTHER APPELLANT

H.E. Mr. Sergio March, Permanent Mission of Canada

THIRD PARTIES

H.E. Mr. Carlo Trojan, Permanent Delegation of the European Commission
H.E. Mr. KM Chandrasekhar, Permanent Mission of India
H.E. Mr. Shotaro Oshima, Permanent Mission of Japan

I. INTRODUCTION AND EXECUTIVE SUMMARY

1. In its other appellant's submission[1], Canada appeals the Panel's conclusion in *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*[2] that the U.S. determination that there is a financial contribution by the Canadian provincial governments in the form of the provision of a good – timber – is not inconsistent with Article 1.1(a)(1)(iii) of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement").[3] Canada specifically appeals two aspects of the Panel's conclusion with respect to the U.S. financial contribution determination: (i) that standing timber is a "good" under Article 1.1(a)(1)(iii); and (ii) that the provincial governments "provided" that standing timber, *i.e.*, that good, to Canadian tenure holders.

2. As the United States demonstrates below, the Panel correctly interpreted Article 1.1(a)(1)(iii) of the SCM Agreement, applying the ordinary meaning of the text of the Article in context and in light of the object and purpose of the SCM Agreement. First, the Panel correctly found that the ordinary meaning of "goods" is broad and includes all tangible objects capable of being owned, including "growing crops, and other identified things to be severed from real property. . . ."[4] The Panel found support in the text of Article 1.1(a)(1)(iii) for interpreting "goods" in accordance with that ordinary meaning. Specifically, the Panel noted that Article

---

[1] *Other Appellant's Submission of Canada*, October 27, 2003 ("Canada Appellant Submission").

[2] *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, WT/DS257/R, circulated August 29, 2003 ("*Lumber Panel Report*").

[3] Article 1.1(a)(1) of the SCM Agreement states that "there is a financial contribution by a government. . . where . . . a government provides goods or services other than general infrastructure."

[4] *Lumber Panel Report*, para. 7.23 (quoting Black's Law Dictionary).

1.1(a)(1)(iii) encompasses the provision of "goods or services *other than general infrastructure*."[5] The Panel noted that the exclusion for "general infrastructure" is consistent with the ordinary meaning of "goods" in Article 1.1(a)(1)(iii). The Panel therefore properly rejected as "excessively narrow"[6] Canada's argument that the term "goods" is limited to "tradeable items capable of bearing a tariff classification."[7]

3. Properly applying the ordinary meaning of "goods," the Panel correctly found that the U.S. determination that standing timber is a "good" within the meaning of Article 1.1(a)(1)(iii) is not WTO-inconsistent. As the Panel stated, "[s]tanding timber indeed seems to us to be an excellent example of an identified thing that can be severed from real property."[8] There is no basis for Canada's attempt to deviate from the ordinary meaning of the term "goods" in its context and in light of the object and purpose of the SCM Agreement. The Appellate Body should therefore affirm the Panel's finding that "goods" in Article 1.1(a)(1)(iii) of the SCM Agreement encompasses standing timber.

4. Second, the Panel examined the provincial stumpage programs (also referred to as tenures) to determine what the programs "provided," *i.e.*, standing timber or, instead, the *right* to harvest standing timber. The Panel found that, as a matter of fact, under the provincial stumpage programs, ownership of standing timber is being transferred from the provinces to the tenure holders. The Panel rejected Canada's argument that tenures transfer only the right to harvest

---

[5] *Id.*, para. 7.25 (emphasis added).

[6] *Id.,* para. 7.27.

[7] Canada Appellant Submission, para. 27.

[8] *Lumber Panel Report*, para. 7.24.

standing timber, stating that "[i]n our view, the right to harvest standing timber is not severable from the right over the standing timber and providing the right to harvest timber is therefore no different from providing standing timber."[9] Thus, the Panel correctly concluded that the U.S. determination that standing timber was "provided" by provincial governments to tenure holders is not WTO-inconsistent.

5. Based on the above analysis, the Panel correctly found that the U.S. financial contribution determination is not inconsistent with Article 1.1(a)(1)(iii) of the SCM Agreement. Accordingly, the Appellate Body should affirm the Panel's conclusion that the U.S. financial contribution determination is not inconsistent with the SCM Agreement and the *General Agreement on Tariffs and Trade 1994* ("GATT 1994").

II. THE PANEL CORRECTLY FOUND THAT THE U.S. DETERMINATION THAT THE CANADIAN PROVINCES PROVIDED A FINANCIAL CONTRIBUTION IS NOT WTO-INCONSISTENT

6. The Canadian provincial governments own the provincial forests ("Crown land") and the trees, *i.e.*, the standing timber, that grow in those forests, and control access to that standing timber.[10] The provinces sell the standing timber on Crown land through contractual arrangements ("tenures") under which companies harvest the timber on specified areas of Crown land in exchange for an administratively set stumpage fee and the assumption of certain forest management obligations associated with harvesting operations.[11] Tenure holders pay only for

---

[9] *Id.,* para. 7.17.

[10] *Id.*, para. 7.15.

[11] *See* Canada Appellant Submission, paras. 11-14. These obligations include, for example, silviculture and fire protection.

timber that they harvest.[12] In its *Final Determination*, the U.S. Department of Commerce concluded that these Canadian provincial "stumpage programs" constitute a financial contribution because the provincial governments are providing a good to lumber producers within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement. That good is standing timber. A financial contribution, as defined in Article 1.1(a)(1)(iii), therefore exists.

7. The Panel correctly found that the U.S. determination that Canadian provincial stumpage programs constitute a financial contribution in the form of the provision of a good, *i.e.*, standing timber, is not inconsistent with Article 1.1(a)(1)(iii) of the SCM Agreement. The Panel based its finding on the ordinary meaning of the terms "goods" and "provides," examined in context and in light of the object and purpose of the SCM Agreement. Accordingly, the Panel's finding should be affirmed.

A. The Panel Correctly Found that the U.S. Determination that Standing Timber is a Good is Not WTO-Inconsistent

1. The Panel Interpreted "Goods" Consistently with Its Ordinary Meaning, In Context and In Light of the SCM Agreement's Object and Purpose

8. Article 1.1(a)(1)(iii) states that a financial contribution exists where the government "provides goods or services other than general infrastructure." The SCM Agreement does not specifically define "goods." Consistent with the customary rules of interpretation of public international law, the Panel considered the ordinary meaning of "goods" in context, and in light of the object and purpose of the SCM Agreement, and determined that the Canadian provinces do

[12] *Id.*, para. 12 (Included within the tenure agreement is the "payment of a volumetric 'stumpage charge' that is imposed upon the exercise of the harvesting right").

provide a good in the form of standing timber.[13]

9. Canada claims that the Panel erred in determining that standing timber is a "good" within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement because, in Canada's view, "goods" as used in Article 1.1(a)(1)(iii) refers only to tradeable items with an actual or potential tariff classification.[14] Canada submits that the Panel erred in giving the term "goods" an interpretation that, although consistent with the ordinary meaning of the term, is "broader than the specific meaning of that word in context."[15] For the reasons discussed below, the United States disagrees that the Panel erred.

10. In considering the ordinary meaning of the term "goods," the Panel recalled that both parties had referred to Black's Law Dictionary which defines goods as "tangible or movable personal property other than money, [especially] articles of trade or items of merchandise <goods and services>," including the unborn young of animals, growing crops and other identified things to be severed from real property.[16] The Panel therefore concluded that the ordinary meaning of the term "goods" includes things "to be severed from real property" such as standing timber.[17]

11. Consistent with the customary rules of interpretation of public international law, the Panel examined this ordinary meaning in the context of Article 1.1(a)(1)(iii) of the SCM Agreement, *i.e.*, "goods or services other than general infrastructure." The Panel noted that the term "goods" is not "qualified in any way" in Article 1.1(a)(1)(iii) and is sufficiently broad to

---

[13] *See Lumber Panel Report*, paras. 7.24-7.28.

[14] Canada Appellant Submission, paras. 25-26.

[15] *Id.*, paras. 25, 28, 43.

[16] *Lumber Panel Report*, para. 7.23 (quoting Black's Law Dictionary).

[17] *Id.*, para. 7.24.

warrant an explicit exclusion for "general infrastructure."[18]

12. Notwithstanding the text of Article 1.1(a)(1)(iii), Canada argued to the Panel that the term "goods" should be limited to tradeable items capable of bearing a tariff classification.[19] The Panel properly rejected Canada's arguments in this regard as "excessively narrow"[20] and not supported by the text of the SCM Agreement. Canada now makes the very same arguments rejected by the Panel, asking the Appellate Body to infer from the use of the phrases "imported goods" and "products" elsewhere in the WTO agreements that the definition of "goods" be limited only to tradeable goods.

13. Canada's arguments are logically flawed and ignore the customary rules of interpretation of public international law. The fact that "products" are goods and "imported goods" are goods does not, logically, give rise to the inference that nothing else can come within the meaning of "goods."[21]

14. Canada takes the term "goods" outside the immediate context of the financial contribution definition in Article 1.1 of the SCM Agreement.[22] Specifically, Canada notes that the adjective "imported" modifies "goods" within the definition of import substitution subsidy in Article 3.1(b) of the SCM Agreement. Canada then leaps to the erroneous and illogical

---

[18]*Id.,* para. 7.25.

[19]*United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, First Written Submission of Canada, December 19, 2002, para. 62.

[20]*Lumber Panel Report*, para. 7.27.

[21]This would be the logical equivalent of saying that, because office buildings are buildings and warehouses are buildings, houses cannot also be buildings.

[22]*See* Canada Appellant Submission, paras. 30-31.

conclusion that "goods" in Article 1.1(a)(1)(iii), even though not modified by the word "imported" or by any other word can only mean "goods" capable of being imported (*i.e.*, traded across borders). The Panel properly recognized that, because of the broad ordinary meaning of "goods," the adjective accompanying the term is often determinative of its specific content.[23] "Goods" as it appears in the text of Article 1.1(a)(1)(iii) is not modified by "imported" or any other adjective. As the Appellate Body has stated, the treaty interpreter is not entitled to assume that the use of different words in different places is "inadvertent": rather, they are presumed to "convey different meanings."[24] Further, the Appellate Body has noted on several occasions that silence on a particular issue -- in this case, the absence of the word "imported" in Article 1.1(a)(1)(iii) -- must mean something.[25] The Panel, relying upon the text of Article 1.1(a)(1)(iii), noted that all that the SCM Agreement suggests is that such goods are capable of being provided. The Article says nothing whatsoever about whether such goods must also be capable of being imported.[26]

15. Canada's attempts to reinforce its erroneous leap of logic by looking to other WTO

---

[23] *Lumber Panel Report*, para. 7.28.

[24] *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, Report of the Appellate Body adopted 13 February 1998, para. 164 (citation omitted) ("The implication arises that the choice and use of different words in different places . . . are deliberate, and that the different words are designed to convey different meanings. A treaty interpreter is not entitled to assume that such usage was merely inadvertent . . . .").

[25] *E.g., United States -- Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R, Report of the Appellate Body adopted 19 December 2002, para. 65.

[26] *Id.*

agreements that cover imported or traded goods,[27] including the GATT 1994, do not support its argument. With respect to the GATT 1994, the scope of the SCM Agreement, including Part V, is determined by Article 1.1 of the SCM Agreement, which defines subsidy practices without any relation to tariff concessions[28] and the Panel properly rejected Canada's effort to manufacture a relationship between the two.[29] With respect to Canada's reference to the other WTO agreements, just as in the case of Article 3.1(b) of the SCM Agreement, references to "imported" or "traded" goods can not be read to mean that when the unmodified term "goods" appears in a WTO agreement it must always be limited by modifiers found elsewhere in the WTO agreements. If anything, the presence of explicit modifiers, when compared with the lack of a modifier in Article 1.1(a)(1)(iii), only confirms the ordinary meaning of "goods" as properly determined by the Panel.

16. Additionally, Canada's attempt to deviate from the ordinary meaning of "goods" in Article 1.1(a)(1)(iii) to include only items tradeable across borders would render superfluous the only express limitation in the provision itself – a limitation that Canada ignores. As the Appellate Body has cautioned, "an interpreter is not free to adopt a reading that would result in reducing whole clauses and paragraphs of a treaty to redundancy or inutility."[30] "General

---

[27]Canada Appellant Submission, paras. 36-38 (referencing the GATT 1994, *Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994*; *Agreement on Trade Related Investment Measures*; and *Agreement on the Rules of Origin)*.

[28]*See* Panel Report, *United States–Measures Treating Export Restraints as Subsidies*, WT/DS194/R, adopted August 23, 2001, para. 8.38 (action inconsistent with Article II of the GATT 1994 would not give rise to a "financial contribution").

[29]*Lumber Panel Report*, para. 7.28.

[30]Appellate Body Report, *United States–Standards for Reformulated and Conventional Gasoline,* WT/DS2/AB/R, adopted May 20, 1996, p. 23 ("*U.S.–Reformulated Gasoline Appellate*

infrastructure" is the only explicit exception from the "goods and services" covered by Article 1.1(a)(1)(iii). If "goods" were intended to be given a special meaning and be read as narrowly as Canada suggests, it could never encompass *any* infrastructure (*e.g.*, a building, road, etc.), let alone general infrastructure; thus, there would be no need for this express limitation. The Panel correctly reasoned, based upon the text, that "if the drafters had wanted to exclude other items such as natural resources or non-tradeable goods, they would have also explicitly excluded such 'goods or services'."[31] The very existence of that express limitation demonstrates that the Members intended the term "goods" to be read in accordance with its ordinary meaning and therefore to include items other than simply those "traded across international borders."

17. The text of the SCM Agreement must also be interpreted in light of its object and purpose, which is to impose multilateral disciplines on subsidies.[32] It is evident from Article 1.1 that the Members recognized that governments have a wide variety of mechanisms at their disposal to confer an advantage on specific domestic enterprises or industries and that they intended to bring those mechanisms within the disciplines of the SCM Agreement.[33] This object

---

Body Report").

[31]*Lumber Panel Report*, para. 7.25.

[32]*See* Panel Report, *Brazil–Export Financing Programme for Aircraft*, WT/DS46/R, as modified on other grounds by the Appellate Body, adopted August 20, 1999, para. 7.26.

[33]Article 1.1 of the SCM Agreement provides that "financial contributions" shall be deemed to exist where:

> (i) a government practice involves a direct transfer of funds (e.g., grants, loans and equity infusion) or potential direct transfers of funds or liabilities (e.g., loan guarantees);
> (ii) government revenue that is otherwise due is foregone (e.g., tax credits);
> (iii) a government provides goods or services other than general infrastructure, or purchases goods;

and purpose of the SCM Agreement confirms that "goods" is to be interpreted so as to impose disciplines on Members subsidizing their industries through the provision of goods or services.[34]

18. While "goods" in Article 1.1(a)(1)(iii) certainly includes tradeable products, there is no basis to limit its meaning to such products when neither the text nor the context in which the term is used, in light of the SCM Agreement's object and purpose, suggests such a limitation. Absent any textual basis for giving a special meaning to the term "goods" in Article 1.1(a)(1)(iii) of the SCM Agreement, the Panel correctly found that the term is to be interpreted in accordance with its ordinary meaning.[35] Consequently, the Panel's decision should be affirmed and Canada's claim to the contrary should be rejected.

2. Standing Timber Is a Good within the Meaning of Article 1.1(a)(1)(iii) of the SCM Agreement

19. Canada next argues that even if the Panel properly determined that the term "goods" retains its ordinary meaning, the Panel misapplied that definition when it found that "unidentified standing timber" is a good.[36] Canada's challenge to the Panel's decision is two-pronged. First, Canada alleges that the Panel failed to determine whether standing timber is "personal property."[37] Next, Canada contends that standing timber is a "good" only if it is specifically identified and that standing timber subject to provincial tenures is not so identified.[38]

(iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out the types of functions listed above.

[34]*See Lumber Panel Report*, para. 7.29.

[35]*Id.*, paras. 7.24, 7.25, 7.28.

[36]*See* Canada Appellant Submission, para. 43.

[37]*Id.*, paras. 44-46.

[38]*Id.,* paras. 43, 48.

20. Neither of these arguments is supported by the text of the SCM Agreement. As discussed above, the ordinary meaning of "goods" relied upon by the Panel includes "tangible or movable personal property other than money," and includes "growing crops, *and other identified things to be severed from real property*. . . . "[39] Applying this ordinary meaning in its context, the Panel properly reasoned that standing timber, *i.e.*, trees, are tangible objects capable of being owned and that "[s]tanding timber indeed seems to us to be an excellent example of an identified thing that can be severed from real property."[40] Therefore, the Panel correctly concluded that standing timber is a good, under Article 1.1(a)(1)(iii). Canada's arguments regarding whether standing timber is "personal property" are inapposite. The Panel properly did not attempt to interpret property laws nor was it required to do so in considering whether standing timber was a good within the meaning of Article 1.1(a)(1)(iii).

21. Canada's contention that standing timber must be "specifically 'identified'"[41] by a contract of sale to be considered a good is not based upon the ordinary meaning of the term "goods" in the context of the SCM Agreement and other WTO agreements. Indeed, rather than relying on WTO text, Canada relies upon a misunderstanding of U.S. law governing contracts for the sale of goods to make this argument.[42] While it is true that one of the definitions of "goods"

---

[39]*Lumber Panel Report*, para. 7.23 (quoting Black's Law Dictionary). The Panel also referenced *The New Shorter Oxford Dictionary* which defines "goods" as "saleable commodities, merchandise, wares."

[40]*Id.*, para. 7.24.

[41]Canada Appellant Submission, para. 48.

[42]Even if the U.S. Uniform Commercial Code were relevant in this context, it provides expressly that "[a] contract for the sale apart from land . . . of timber to be cut is a contract for the sale of goods within this Article whether the subject matter is to be severed by the buyer or by the seller . . . and the parties can by identification effect a present sale before severance." Uniform

includes "*identified things* to be severed from real property,"[43] Canada makes the illogical leap to claim that this particular phrase, "identified things," imposes a strict requirement that each individual item must be specifically and individually tagged for it to be considered a "good." The Panel found, and indeed, common sense dictates, that goods (in this case, standing timber) simply have to be capable of being identified in some way; otherwise, there is no way to know what is being provided or sold.[44]

22. The Panel properly considered and rejected Canada's distinction between a contract which identifies individual trees to be cut, and one that identifies trees by reference to a particular area of forest land. There is no basis for asserting that the latter "identification" is inadequate. The Panel found that in both instances the goods are identified, stating that "although a tenure agreement may not provide for a precise number of identified trees to be cut, the tenure holder knows all too well how many trees and which species of trees can be found on the area of land covered by his tenure."[45]

23. In sum, the Panel correctly found that the United States properly determined that standing timber is a "good" within Article 1.1(a)(1)(iii) of the SCM Agreement. Thus, the Panel's finding should be affirmed.

Commercial Code section 2-107(2) (Exhibit CDA-110).

[43]*Lumber Panel Report*, para. 7.23.

[44]*See Lumber Panel Report*, para. 7.24, where, contrary to Canada's argument for a strict identification requirement, the Panel noted that in its Sale of Goods Act, the Canadian Province of British Columbia defined "goods" as including " . . . growing crops, whether or not industrial, and things attached to or forming part of the land *that are agreed to be severed* before sale or under the contract of sale." (Emphasis added).

[45]*Id.*, para. 7.18.

B. The Panel Correctly Found that the United States Properly Determined that the Provincial Governments Provide Standing Timber to Tenure Holders

24. The Panel, having correctly found that the standing timber subject to the provincial tenures is a good, also considered whether the provincial governments *provided* that good to tenure holders.[46] Interpreting "provides" consistent with its ordinary meaning and in context, and applying the facts before it, the Panel correctly found that through the stumpage programs, ownership of the standing timber is transferred from the provincial governments to the tenure holders during the period of the tenure.[47] This transfer of ownership of the standing timber was the "provision" of goods under Article 1.1(a)(1)(iii).

25. Canada claims that the Panel erred in not distinguishing the *right* to harvest standing timber from the provision of standing timber.[48] Canada submits that the only thing "provided" by the provincial governments is an intangible right to harvest,[49] and the granting of such a right is not the "provision of a good."[50]

26. Canada's argument elevates form over substance by ignoring the Panel's well-considered factual findings concerning the provincial stumpage programs, as well as the Panel's interpretation of the ordinary meaning of the term "provide" in Article 1.1(a)(1)(iii) of the SCM Agreement in its context and in light of the object and purpose of the SCM Agreement.

27. The Panel's finding that the provincial governments provide standing timber to timber

---

[46] *See supra* fn. 3.

[47] *Lumber Panel Report*, para. 7.15.

[48] Canada Appellant Submission, para. 53.

[49] *Id.*, para. 56.

[50] *Id.*, para. 57.

harvesters was thoroughly supported by the facts presented to it. The provincial governments own the Crown forests and the trees, *i.e.*, the standing timber, that grow in the forests.[51] Tenure holders may only obtain standing timber from these Crown forests for harvesting and processing through tenure or licensing agreements with the provincial governments.[52] Tenure holders pay a volumetric charge to the provincial government for the standing timber based upon the timber that is actually harvested[53] as well as agreeing to undertake certain forest management obligations and in-kind costs.[54] In return, the timber harvesters receive ownership rights of the trees upon harvesting the trees.[55]

28. Notably, the Panel described the volumetric stumpage charges for the trees harvested as "the price to be paid for the timber,"[56] and referred to the other forestry management obligations forming part of the tenures as "conditions of sale."[57] In exchange for tenure holders making these volumetric payments and undertaking these other conditions of sale, the provinces transfer ownership of the standing timber to the tenure holders. It should be beyond dispute that when a government transfers ownership of a good, by giving a company the right to take a good, whether it is the right to take widgets from a government warehouse or timber from government land, the

---

[51] *Lumber Panel Report,* para. 7.15.

[52] *Id.;* Canada Appellant Submission, paras. 11, 12.

[53] *Lumber Panel Report*, para. 7.15.

[54] *Id.*

[55] *Id. See also,* para. 7.14, citing Canada's response to Questions of the Panel at the First Meeting (Annex A-1), para. 8. Indeed, the Panel noted that "it appears the United States is correct when it argues that 'there is no record evidence of stumpage contracts under which the contracting party (tenure holder or licensee) does not have ownership rights to the harvested timber.'" *Id.*

[56] *Id.*, para. 7.15.

[57] *Id.*, para. 7.16.

government is "providing" that good within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement.[58]

29. Through this transfer of ownership of the standing timber from the governments to tenure holders, the provincial governments "provide" standing timber as contemplated under Article 1.1(a)(1)(iii) of the SCM Agreement. In reaching its finding, the Panel interpreted "provides" in Article 1.1(a)(1)(iii) consistently with its ordinary meaning, in context, and in light of the SCM Agreement's object and purpose. The *New Shorter Oxford English Dictionary* states that "provide" means to "make available" or "supply or furnish for use."[59] The Panel reasonably concluded that the act of transferring ownership of the standing timber from one party to another was encompassed within this ordinary meaning of the term "provides."[60]

30. From the perspective of the government, "the provision and processing of standing timber is what the stumpage programmes are all about."[61] The Panel properly recognized that "[t]he only way for the government to provide the standing timber that it owns to the harvesters and the mills for processing is by allowing the harvesters to come on the land and harvest the trees."[62] If

---

[58]Canada's reference to patent rights does not make sense in the context of this case. *See* Canada Appellant Submission, para. 57. The "right" generally granted through the government's issuance of a patent is the right to exclude others from making or selling products incorporating a patented invention, not the right to produce to a good. *See* Article 28, *WTO Agreement on Trade-Related Intellectual Property Rights.*

[59]*United States– Final Countervailing Duty Determination With Respect to Certain Softwood Lumber From Canada*, First Written Submission of the United States, 22 January 2003, para. 29 (quoting *The New Shorter Oxford English Dictionary*, 2393 (1993)) (Exhibit U.S.-5).

[60]*Lumber Panel Report*, para. 7.29.

[61]*Id.*

[62]*Id.*, para. 7.15.

the government itself fells the trees and then transfers ownership, it is providing felled trees, not standing timber.[63] Because standing timber is a good, entering into agreements whereby tenure holders harvest the trees is, indeed, the only way to provide that good to the harvesters.

31. In advancing its argument that all that was conveyed by the provincial governments was an intangible right, Canada claims that the Panel did not interpret the term "provides" at all, and in any case the term cannot be read to mean "makes goods available" or "makes it possible to obtain goods."[64] Canada contends that, throughout the WTO agreements, "provide" connotes a more affirmative act of "giving" something, rather than simply enabling someone to obtain something.[65] Again, Canada appears to be advocating an interpretation of "provides" that deviates from the ordinary meaning of the term.

32. Canada's claim fails in three respects. As an initial matter, although Canada would prefer to ignore what the Panel actually said, the Panel's finding is that "provides" encompasses the provincial governments' transfer of ownership of the standing timber.[66] The Panel did not specifically find that "making available" was "providing," because it did not have to: it found that transferring ownership was "providing." Second, Canada's citation to other WTO agreements in support of its reading of "providing" as an affirmative act is little more than a selective quotation of the agreements, with the word "provides" in italics.[67] There is no analysis to support Canada's conclusion that "provides" in Article 1.1(a)(1)(iii) of the SCM Agreement,

---

[63] *See* Canada Appellant Submission, para. 58.

[64] *Id.*, para. 53.

[65] *Id.*, para. 55.

[66] *Lumber Panel Report*, para. 7.15.

[67] *Id.*, fns. 40-42.

and in the WTO agreements as a whole, must be given a special meaning in lieu of its ordinary meaning. Third, even if the basis of the Panel's finding could be interpreted to mean that the provincial governments "make standing timber available," the ordinary meaning of the term "provide" includes "make available," so such an interpretation would be consistent with Article 1.1(a)(1)(iii).[68]

33. Through an examination of the text of the SCM Agreement, in light of its object and purpose, the Panel correctly found that the U.S. determination that provincial stumpage programs provide standing timber to timber harvesters is not inconsistent with Article 1.1(a)(1)(iii) of the SCM Agreement. The Panel's determination should therefore be affirmed and Canada's claim rejected.

III. THE APPELLATE BODY SHOULD NOT MAKE SPECIFIC RECOMMENDATIONS WITH RESPECT TO IMPLEMENTATION OF ANY FINDINGS AND RECOMMENDATIONS.

34. Canada asks the Appellate Body to recommend to the Dispute Settlement Body ("DSB") that the United States take specific actions to bring its measure into conformity with WTO obligations, including by revoking the countervailing duty order, ceasing to impose countervailing duties and returning cash deposits.[69] In so doing, Canada has requested a specific remedy that is inconsistent with the WTO *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU").

---

[68]*United States– Final Countervailing Duty Determination With Respect to Certain Softwood Lumber From Canada*, First Written Submission of the United States, 22 January 2003, para. 29 (quoting *The New Shorter Oxford English Dictionary*, 2393 (1993))(Exhibit U.S.-5).

[69]Canada Appellant Submission, para. 65.

35. The United States does not agree that its measure is inconsistent with WTO obligations. In any event, Canada's requested specific remedy would be contrary to the DSU, which specifies in Article 19.1 the recommendations that a panel or the Appellate Body is authorized to make. Article 19.1 of the DSU states:

> Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. (Footnotes omitted).

36. Under Article 19.1 of the DSU, Canada's request would not be appropriate even if it had been phrased as a request for a suggestion by the Appellate Body. Aside from the fact that the U.S. measure at issue is consistent with the WTO, a Member generally has many options available to bring a measure into conformity with its WTO obligations and the United States asks that the solution to be arrived at by the parties to the dispute not be prejudged.[70] If a complaining party is dissatisfied with the implementation of the DSB's recommendations and rulings, that party has recourse pursuant to the DSU.

IV. CONCLUSION

37. For the foregoing reasons, the United States requests that the Appellate Body reject the arguments of Canada in their entirety and affirm the Panel's finding and conclusion in paragraphs 7.30 and 8.1(a) of its report.

---

[70]Previous panel and Appellate Body reports have also declined to consider how a Member should implement the recommendations and rulings of the DSB. *See, e.g.,* Panel Report, *United States–Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, adopted 23 August 2001, paras. 8.5-8.14; Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations"*, WT/DS108/AB/R, adopted 20 March 2000, para. 175; and *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, Appellate body Report, WT/DS166/AB/R, adopted 19 January 2001, para. 185.