August 22, 2003

BY HAND DELIVERY **C-122-839**

Pages:
Policy Bulletin Comments

Public Document

The Hon. Grant D. Aldonas
Under Secretary for International Trade
United States Department of Commerce
Central Records Unit
Room 1870
Pennsylvania Avenue and 14th Street, N.W.
Washington, D.C. 20230

Attn.: Softwood Lumber Policy Bulletin

Dear Mr. Aldonas:

Please find here rebuttal comments of the Ontario Forest Industries Association ("OFIA"), the Ontario Lumber Manufacturers Association ("OLMA"), and the Free Trade Lumber Council ("FTLC") in response to the Department of Commerce's request for comments and rebuttal comments, published in the Federal Register on June 24, 2003.[1] OFIA, OLMA, and the FTLC filed initial comments on August 8, 2003, as did a number of other interested entities. These rebuttal comments are based on the comments of those others who responded to the Federal Register notice. They are timely filed consistent with the extension issued by the Department on July 24, 2003.[2]

OFIA, OLMA and the FTLC do not here comment on everything written and submitted by everybody. These rebuttal comments are focused on constructive engagement with the Department of Commerce and the draft Policy Bulletin, not with the other parties.

Respectfully submitted,

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Counsel to OFIA, OLMA and FTLC

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[1] *Proposed Policies Regarding the Conduct of Changed Circumstances Reviews of the Countervailing Duty Order on Softwood Lumber from Canada*, 68 Fed. Reg. 37,456 (Dep't Comm.June 24, 2003).
[2] *Memorandum to All Reviewers from James Terpstra, Program Manager Import Administration re Extension of Comment Period* (July 24, 2003).

GENERAL STATEMENT OF POLICY

Summary Of The Comment

The Department needs a less ideological and more systematic examination of policies and practices should it persist in seeking reforms that encourage more competitive markets where supply generally is reduced and prices generally rise. The assumptions and assertions in the Bulletin at present, supported especially by the Coalition, are not the products of investigation or "findings."

The Department needs to clarify whether all the effects of policy reform must be demonstrated to the Coalition's and Department's satisfaction before the countervailing duty order can be revoked, and whether the provinces must accept the imposition of policy reforms in order to be eligible for changed circumstances review and release from the order. The Department cannot reliably predict the effects of reform, and should not hold the provinces hostage to unpredictable results.

Comment

Submissions to the Department generally did not identify, in their introductory remarks, what section of the Bulletin they were addressing. The "Introduction" section of the Coalition's submission, however, may be addressed appropriately in the section on "General Statement Of Policy."

The Coalition seeks in its submission to press its legal case, notwithstanding the Bulletin's purpose to seek a long-term durable solution to the dispute, not a renewal or extension of conflict. The case is pursued through assertions and assumptions, most prominently in claims about what "the Department found during the investigation."

The Coalition claims the Department found "that Canadian provincial systems incorporate numerous non-market supply and pricing mechanisms, which collectively confer countervailable benefits on the production of softwood lumber."[1] The Department, however, made no such findings, nor did it even investigate "provincial systems." The Department found that provinces did not receive adequate remuneration for stumpage, based on illegal cross-border comparisons of stumpage prices in the United States and in Canada.[2]

The Coalition's point signals an inherent tension in the Bulletin. The Bulletin calls upon the provinces to reform practices based on a series of allegations and assertions about the impact of such practices on market behavior. The Department never investigated these practices, made no findings about them, and in many instances is mistaken about them. For example, the Department insists that elimination of minimum processing requirements will reduce lumber production.[3] The Coalition goes even further, claiming that minimum processing requirements "significantly depress the price of domestic logs."[4]

Minimum processing requirements, as an example, likely have the opposite effect imagined by the Department and the Coalition. By assuring that harvests are actually processed, such requirements contribute to conservation, reduce

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[1] Coalition Comments at 1.

[2] *See generally, Certain Softwood Lumber Products: Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination*, 67 Fed. Reg. 15545 (April 2, 2002), incorporating by reference the *Issues and Decision Memorandum* from Bernard T. Carreau, Deputy Assistant Secretary, to Faryar Shirzad, Assistant Secretary for Import Administration ("IDM").

[3] Policy Bulletin, 68 Fed. Reg. at 37458, 37460-61.

[4] Coalition Comments at 9.

the overall supply of logs for processing, and raise the price of domestic logs. Hence, much of what preoccupies the Department, the reform of numerous practices, may yield unintended results that increase instead of reducing supply, depress instead of raising prices, and encourage overcutting instead of conservation.

The Department needs a less ideological and more systematic examination of policies and practices should it persist in seeking reforms that encourage more competitive markets where supply generally is reduced and prices generally rise. The assumptions and assertions in the Bulletin at present, supported especially by the Coalition, are not the products of investigation or "findings."

The Coalition extends these assertions and assumptions into indefensible conclusions. For example, still in its "Introduction," the Coalition claims that provincial practices and policies "have significantly reduced provincial revenue streams."[5] The evidence of record in the investigation, however, is to the contrary. Alberta, British Columbia, Ontario and Québec all supplied the Department with detailed data addressing the third benchmark in the Department's regulatory hierarchy, all proving that they received revenue far in excess of their costs in operating and maintaining the forests and stumpage systems.[6] The record also shows, by contrast, that (albeit possibly the result of gross mismanagement) the United States Forest Service ("the Forest Service") loses substantial sums of money managing forests, especially as the

[5] Coalition Comments at 3.

[6] *See* PricewaterhouseCoopers, LLP, Report on Revenues and Expenditures of Certain Canadian Provinces Relating to Stumpage Operations (June 25, 2001), in Response of the Government of Alberta to U.S. Department of Commerce May 1, 2001 Questionnaire (June 28, 2001), Vol. 1 at Appendix A; Response of the Government of British Columbia to U.S. Department of Commerce May 1, 2001 Questionnaire (June 28, 2001), Part B, Vol. 2 at Appendix A; Response of the Government of Ontario to U.S. Deaprtment of Commerce May 1, 2001 Questionnaire (June 28, 2001), Vol. 9 at Appendix A; Response of the Gourvernment du Quebec to U.S. Department of Commerce May 1, 2001 Questionnaire (June 28, 2001), Vol. 1 at Appendix A.

American taxpayer carries expenses in the forest that Canadian forest industries pay instead of government.[7] Assuming the Coalition is correct – that provincial policies and practices reduce revenue streams – it is remarkable that nonetheless provincial forestry is very profitable for the public purse, while in the United States, which is offered as a model for Canadian reform, the Forest Service is in perpetual deficit.

The Coalition asserts that "significant conditions must be imposed on provincial systems."[8] Such a claim of authority of one sovereign over another can hardly yield a long-term durable solution to a dispute. And the Coalition demands that the provinces "demonstrate that reforms generate market-consistent results" – the reforms chosen and imposed by the United States – in order "to achieve revocation of the order."[9] By this formulation, sovereign provincial governments are to have "significant conditions imposed" on them, must assume responsibility for proving the effects of these conditions, and cannot be released from the countervailing duty order founded on the application of an illegal benchmark until the reforms "generate results equivalent to what would obtain in truly open and competitive timber and log markets and documents these changes through a CCR."[10] According to the Coalition, provinces must submit to the imposition of reforms, and prove that the reforms chosen by the Department and the Coalition have been effective, based on an illegal benchmark.

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[7] *See Ontario Forest Industries Association, Ontario Lumber Manufacturers Association, and Free Trade Lumber Council Comments to the U.S. Department of Commerce Softwood Lumber Policy Bulletin*, C-122-839 (August 8, 2003) ("OFIA/OLMA/FTLC Comments"), at 16. See also "Forest Service: Barriers to Generating Revenue or Reducing Costs," *GAO Chapter Report*, (GAO/RCED 98-58, Feb. 13, 1998) ("The GAO Report"), at 5, 36, 40-41 (submitted as attachment 3 to Letter from Baker & Hostetler LLP to the Department of Commerce, Case No. C-122-839 (Dec. 31, 2001).

[8] Coalition Comments at 3.

[9] Coalition Comments at 4.

[10] *Id.*

The Department needs to clarify whether the Coalition's characterization of the policy embedded in the Bulletin is correct. Must all the effects of policy reform be demonstrated to the Coalition's and Department's satisfaction before the countervailing duty order can be revoked? Must the provinces accept the imposition of policy reforms in order to be eligible for changed circumstances review and release from the order?

I.A. Policies and Practices That Inhibit Market Response

Summary Of The Comment

Specific policy reforms may have unpredictable and unintended consequences. There can be no effects test, therefore, for policy reform to qualify for changed circumstances review and revocation of the countervailing duty order, and no expectation of monitoring post-revocation.

The Coalition recommends a bilateral approach to log export restrictions. A bilateral recognition of issues, such as the United States Forest Service payment for many services and infrastructure paid by private industry in Canada, could help substantially in reaching a long-term durable solution to the softwood lumber dispute.

Comment

The Natural Resources Defense Council ("NRDC")[1] recognizes that not all the reforms demanded by the Bulletin will necessarily yield expected outcomes. The NRDC wants to retain, for example, maximum cut controls and log export restrictions, and concludes that, "Eliminating long-term tenure is not the answer and should not be a requirement of this policy bulletin."[2] Yet, the NRDC is confused about provincial practices, presuming, for example, that Canadian governments pay for "planning, administration, reforestation and restoration, road maintenance and the opportunity costs foregone by not retaining the resource to provide environmental services,"[3] when in Canada industry pays for all of these items and more (including road construction,

[1] The NRDC Comments were coauthored and filed jointly with the following organizations: Defenders of Wildlife, Alberta Wilderness Association, Northwest Ecosystem Alliance, West Coast Environmental Law Association. Reference hereinafter to the collective as "NRDC."

[2] *Natural Resources Defense Council, et al., Comments to the U.S. Department of Commerce Softwood Lumber Policy Bulletin*, C-122-839 (June, 24, 2003) ("NRDC Comments"), at comment to Section I.A.5. "Long-Term, Non-Transferable Tenure."

[3] *Id.* at comment to Section I.A "Policies and Practices That Inhibit Market Response."

silviculture, fire-fighting, insect control).[4] NRDC seems to confuse the Canadian situation with the American: the Forest Service, and state authorities, do pay for all of these activities in the forests, heavily subsidizing U.S. forest industries.[5]

Each of the submissions to the Department has a different view of the specific proposed policy reforms. The Department should appreciate that these divergent views necessarily mean that there is no single correct view of the proposed reforms, and that they do not constitute a technocratic or economically reliable or rigorous response to the Department's perception of the challenge – to make Canadian timber markets more open and competitive. Different policies and practices may have multiple effects, and their elimination or change may have unintended consequences. The rhetoric that currently sustains the recommended reforms in the Bulletin needs to be cleansed by critical analysis so that the approach to reform is more nuanced and less categorical.

Despite these hazards in the Bulletin and the comments, the Coalition commentary on log export restrictions does represent potentially an important breakthrough in the softwood lumber impasse. The Coalition admits to the hypocrisy arising from U.S. restrictions, and concedes that environmentalists often support such restrictions. The Coalition, in the end, calls for "a legally adequate standard without requiring wholesale repeal of these rules."[6]

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[4] *See Crown Forest Sustainability Act, 1994*, S.O. 1994, Chapter 25 (which requires each tenure holder to provide and carry out a Forest Management Plan, which must be authorized by the Federal government, as a requirement to hold tenure). *See also, e.g.,* Tembec Inc. Case Brief, Case No. C-122-839 (Feb. 22, 2002) ("Tembec Case Brief"), at 26 ("Ontario stumpage system is designed to allow the province to shift many of the burdens as caretakers of the public forests to its tenure holders."); Ontario Forest Industry Association and the Ontario Lumber Manufacturing Association Case Brief, Case No. C-122-839 (Feb. 22, 2002) ("OFIA/OLMA Case Brief"), at 68.

[5] *See* The GAO Report at 5, 36, 40-41.

[6] Coalition Comments at 11.

The Department should seize upon this breakthrough as an organizing principle for a revised Bulletin. U.S. practices should be taken into account, not only for log export restrictions, but in all dimensions of forest practices, including especially the extensive government subsidies resident in the provision of roads, silviculture, fire-fighting and insect and disease protection.[7] The Department should restructure the Bulletin so that Canada is not called upon to achieve market arrangements that do not exist in the United States, but rather to operate within its own market for adequate remuneration.

Were the Department to enter the Coalition's opening recognition of U.S. practices to achieve a fair balance between Canada and the United States, it could move the softwood lumber dispute substantially closer to a long-term, durable solution than the Bulletin in its present form. The Coalition's call, therefore, for "bilaterally lifting export restrictions,"[8] extended to a genuine bilateralism on all issues and practices, could transform the Bulletin and the contribution of the Department.

The Coalition is inclined, despite its apparent generosity in proposing bilateral change, to demand that Canada make the first moves ("Canadian governments should, as a first step, eliminate all limitations on and regulations governing the export of logs harvested from private lands").[9] Still, the Department could grasp the bilateral principle instead of the Coalition's articulation of implementation.

The Coalition argues the evils of tenure for competition and the extraordinary value they have for tenure-holders,[10] while the NRDC and others contend

[7] OFIA/OLMA/FTLC Comments at 52. S*ee also* The GAO Report at 41.

[8] *Id.*

[9] *Id.*

[10] *Id.* at 12-13.

that tenures should be assigned no value, stripped from large companies without compensation.[11] Absent from both these perspectives is the bilateralism invoked over log export restrictions by the Coalition, and the recognition bestowed on the subject by the Gouvernement du Québec that private ownership in the United States – typically the product of land give-aways – is of much greater value than tenure in Canada.[12] Were the Coalition to bring the same spirit of bilateral and even-handed reform to tenure as it suggests for log export restrictions, the relative market impact of tenures and private ownership could be examined and addressed for possible adjustment of the systems in both countries.[13]

The Coalition emphasizes in this section that the Department must examine the results and effectiveness of reforms. Without specifically using the terms or language, the Coalition must be asking the Department to monitor provincial reforms: "Finally, the Department should clarify that it will examine tenure transfer rules and

[11] NRDC Comments at comment to Section I.A.5. "Long-Term, Non-Transferable Tenure."

[12] *See Gouvernement du Québec Comments Regarding the Conduct of Changed Circumstances on the Countervailing Duty Order on Softwood Lumber from Canada* (C-122-839) (Aug, 8, 2003)**,** comment 6 at 17.

[13] The Coalition has larded its discussion with irrelevant allegations of additional subsidies, especially tenure security in particular and tenure more generally. Coalition Comments at 13-15. These digressions are regrettable, but the Department opened the way to them by discussing "offsetting provincial actions." The NRDC perceived the discussion through American lenses, worrying about "roll backs of environmental protections through new legislation or lack of enforcement of existing laws," which are well-known and documented in the United States but not a serious problem in Canada. NRDC Comments at comment to Section I.A.6 "Offsetting Provincial Actions." In federal forests in the United States, winning auction bids must be executed within a fixed time period, regardless whether the market for downstream products justifies harvesting, yet both the NRDC and the Coalition fret in their comments to the Department that a requirement to cut within the Annual Allowable Cut in Canada within a set time period may force onto the market timber that otherwise would have remained standing. Coalition Comments at 8-9; NRDC Comments at comment to Section I.A.2. "Minimum Cut Requirements." The lack of symmetry in these understandings is an impediment to a long-term, durable settlement. The Department therefore should delete its discussion of "offsetting provincial actions" or, in the alternative, introduce a reciprocal discussion that recognizes fairly the many problematic practices in the United States.

harvesting requirements to ensure that these policies do not generate new subsidies or negate the impact of other reforms."[14]

The Department must resist any urge to monitor or continue engagement with provincial governments after revocation of the countervailing duty order, and it must resist perpetual postponement of revocation waiting to see and test the results of policy reforms. Any such arrangement, whereby the Department will defer revocation while monitoring or testing results, can only signal provincial governments that there is no realistic expectation that the Bulletin will lead to a solution to the softwood lumber dispute – short-term, long-term, or in between.

[14] Coalition Comments at 6.

I.B.1. Reference Prices

Summary Of The Comment

The size of the private market is irrelevant in ascertaining its utility as a reference market for measuring adequate remuneration. The reference market is for adequate remuneration, not fair market value.

Comment

The Coalition accepts that the size of a private market is not dispositive of whether it may serve as a benchmark,[1] but commits its discussion to the premise of fair market value by insisting that prices must "fully reflect market forces."[2] There is no such requirement in the terms of adequate remuneration, and can be no such requirement in the Bulletin.

The Coalition insists in this section that complete policy reform is essential to the potential acceptability of a domestic private market. The law, however, which the Bulletin professes in its opening statements to be upholding and advancing, requires only that adequate remuneration be determined in reference to prevailing domestic market conditions, the conditions as they exist in Canada. The discussion, therefore, of reference prices turns here on the premise of converting "adequate remuneration" into "fair market value," which is contrary to law.

The Coalition's discussion cannot inform the revised Bulletin because it relies totally on an erroneous understanding of the law:

> First and most fundamentally, for a province to qualify for revocation through a CCR, the Department must ensure that policy

[1] The NRDC seizes upon size in terms of volume instead of numbers of participants or transactions as an important indicator of whether a private market will be "truly competitive." The size of the market does not matter by any measure.

[2] Coalition Comments at 18.

> reform eliminates the countervailable subsidy. If the government sells goods for adequate remuneration, e.g., (sic) fair market value, no countervailable benefit exists. 19 U.S.C. § 1677(5)(E)(iii). Thus, the reference market must yield fair market prices.[3]

The entire subsequent discussion as to what is required for a reference price depends on satisfying "fair market value," which is not the law.

That the Coalition has gone astray here is not the fault of the Coalition. It is the fault of the Department, which declared adequate remuneration to be fair market value. The Department therefore must correct the erroneous understanding of the law, and correct everything in the Bulletin that flows from it. Adequate remuneration refers to prevailing market conditions, meaning conditions as they exist – not conditions as the Department would wish them to be, command them to be, or insist upon. The alleged countervailable subsidy is eliminated when there is adequate remuneration, which in the view of the Canadian parties is the condition already today.

The Coalition, relying upon the substitution of fair market value for adequate remuneration, demands that provinces both change fundamentally their practices and policies, and sell all timber "competitively," which to the Coalition means by auction. The Coalition accepts, however, that the countervailing duty order could be revoked with something less than all timber being sold "competitively," and perhaps with something less than all reforms implemented.[4] The Coalition appears to confer upon the Department the determination as to how much in each category will be enough, but also appears to reserve for itself the flexibility to make that judgment. Because the changed circumstances review is adversarial, it is incumbent upon the Department to clarify in the Bulletin how much will be enough, and to enforce that standard when the time comes.

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[3] *Id.* at 19.

[4] *Id.* at 41.

I.B.1.b. Quality Of Information

Summary Of The Comment

Information about private transactions in the United States is kept private. It is unreasonable to insist that private information in Canada must be public.

Comment

The Bulletin contains an exaggerated expectation that Canadians should reveal complete information about their private transactions even as such information is not available in the United States.[1] The NRDC goes further. It wants an effective ban on traditional forms of barter and exchange, and an enforced reporting on all private transactions.[2] Despite the Coalition's suggestion that provincial forestry practices are "Soviet style,"[3] this proposal more closely resembles a "Soviet" solution than any current practice in Canada or the United States. Private transactions are what their name implies. The insistence on information about private transactions would render them no longer private.

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[1] Policy Bulletin, 68 Fed. Reg. at 37459-62.

[2] NRDC Comments at comment to Sections I.B.1 "Reference Prices," I.B1.b "Quality of Information," I.B.1.e "Safeguard Against Collusive Behavior," 1.B.2.a "Transparency In The Functioning Of The Market Used As A Reference Point For Market Prices."

[3] Coalition Comments at 2.

I.B.1.c. Direction Of The Causal Link

Summary Of The Comment

The Department made no finding, only an assertion, about distortion of private prices caused by government presence in the market. The Bulletin cannot rely on assertion and speculation, and the strong evidence of record, particularly the Charles River Associates study for Ontario, is that a relatively small private market can function fully on market principles without distortion from a large-scale government presence.

Comment

The Coalition endorses the Department's discussion of the "direction of the causal link," and then demands more. The argument, however, is based again on an alleged "finding:" "The Department already found after extensive investigation, briefing and argument that significant, low-priced administered volumes distorted existing minority competitive markets in Canadian provinces."[1] The Department made this assertion, but it provided no evidence, nor any evidence of any "extensive investigation" of the question. The Department asserted that governments in Canada defined prices in the provincial private markets, but proved nothing and ignored substantial contrary evidence.[2]

The Coalition concluded, based on the Department's assertion, that "the mere presence of enormous administered supply can drive prices in a smaller

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[1] *Id.* at 28.

[2] *See* Government of Ontario Case Brief, Case No. C-122-839 (Feb. 25, 2002) ("GOO Case Brief"), at 8-33; Gouvernement du Québec Case Brief, Case No. C-122-839 (Feb. 22, 2002) ("GdQ Case Brief"), at 15-16; *see also* Response of the Government of Ontario to the U.S. Department of Commerce Nov. 21, 2001 Second Supplemental Questionnaire (Dec. 17, 2001) ("ON Dec. 17 Supp. Q. Resp."), Vol 3, Exh. ON-SPU2-12 (containing Charles River Associates, *An Analysis of the Appropriateness of Relying on Ontario Private Timber Studies 20* (Dec. 14, 2001) ("CRA Study")); Response of the Gouvernement du Québec to the U.S. Department of Commerce July 5, 2001 Questionnaire (Aug. 3, 2001), Vol. 3, Exh QC-5-100 ("The Private Forest Standing Timber Market in Québec").

competitive segment."[3] Neither empirical, nor even sophisticated theoretical evidence was offered by the Department or the Coalition to support this proposition. Hence, the subsequent discussion insisting upon the "direction of the causal link" relies on speculation and assertion.[4]

For the Department to pursue this premise, it will need to develop a reliable theory that refutes the theory advanced by Charles River Associates in the investigation, and it will need empirical evidence.[5] A Policy Bulletin should not rely on assertion and speculation.

[3] *Id.*

[4] The NRDC is fixated on market size, but as part of an ideological drive to dismantle large, integrated companies, using the Bulletin as a vehicle for social welfare and land and tenure redistribution.

[5] *See* ON Dec. 17 Supp. Q. Resp. at Exh. ON-SUP2-12.

I.B.1.d. Barriers To Entry Or Exit In The Market

Summary Of The Comment

Tenures are not a barrier to entry or exit in timber markets, and compare favorably in that regard to the private ownership that dominates in the United States. The NRDC's demand that large companies be broken up in order to enhance market operations is an unsupported ideological plea.

Comment

The Coalition perceives tenures as a significant barrier to market entry. The Coalition does not acknowledge the fluidity of tenures, nor admit to the more substantial barrier of private land ownership in the United States. Tenure here is a *canard*, and reference to it does not advance the definition of a competitive market for reference prices.

The NRDC returns to a defense of log export restrictions in this section. It also emphasizes a preference for a market in logs, not tenure, as it sees the free trading of tenures as aiding large companies to the public's detriment. The mission of the Department cannot be to break up large or integrated Canadian companies, especially as Canadian lumber producers are dwarfed by American entities. Nor can it be to create log markets. The purpose of the Bulletin, in supporting a long-term, durable solution to the softwood lumber dispute, must be to establish legal and legitimate measures of adequate remuneration, and eschew alternative agendas.

I.B.1.e. Safeguards Against Collusive Bidding

Summary Of The Comment

Collusive bidding in auctions is more of a problem in the United States than in Canada.

Comment

The Coalition appears to speak from experience as to collusive bidding, a practice known to have been perfected at auctions in the United States.[1] Its call for provincial rules against such bidding would be more authentic and genuine were it accompanied by the same spirit of bilateralism that informed the discussion of log export restrictions.[2]

[1] *See* OFIA/OLMA/FTLC Comments at 34 n.15.

[2] *See supra* comment I.A. "Policies and Practices That Inhibit Market Response" at 9.

I.B.2. Transparency

Summary Of The Comment

Traditional bartering is a form of private transaction and does not provide a reasoned basis for objections by parties demanding less government involvement in the marketplace. The Department must accept that timber in Canada is destined to remain predominantly in the hands of the crown. Ontario's stumpage system is unique in North America in utilizing downstream product prices to drive the price of timber.

Comment

The Coalition has interpreted this section of the Bulletin to refer to the transparency of provincial reforms, while the NRDC uses the section to renew its call for the effective abolition of bartering and log swaps. The Coalition, too, focuses on log bartering and swaps by using the Vancouver Log Market as its example of opaque trading.

These comments neglect the purpose of the Bulletin. A professed objective of the Bulletin is to increase private transactions and reduce dependence of Canadian forest industries on crown timber supply. Yet, the Coalition and the NRDC see the Bulletin also as an opportunity to reduce private transactions when they object to their form or limited public exposure. The exercise then becomes one of transforming private to public in the name of converting public to private.

The Coalition also exploits this section to assail Québec's parity system and to advance a case for minimal adjustments in equilibrating values of crown and private timber.[1] Canadian timber is predominantly owned by the crown and will continue

[1] Coalition Comments at 33.

to be. The crown requires far more of private harvesters than any government requires in the United States, and more than private owners require of harvesters to whom timber is sold in Canada.[2] Therefore, unless the Bulletin commits to the use of mill delivered wood costs, there will always necessarily be a need for substantial adjustments.[3]

In this section, the Coalition criticizes Ontario's residual value pricing system. The Coalition neglects to mention that the residual value pricing system is based on downstream prices of lumber, which the Bulletin declares is the appropriate driver of timber prices.[4] Indeed, the Ontario system is more driven by downstream prices than any pricing mechanism for public timber in North America. No known public timber pricing system in the United States is affected by downstream product prices at all.[5] The critique therefore is misguided if not simply disingenuous.

[2] *See* GOO Case Brief at 49-62; GdQ Case Brief at 49-50; IDM at 30. *See also* OFIA/OLMA/FTLC Comments at 52.

[3] *See* OFIA/OLMA/FTLC Comments at 37.

[4] *See* Tembec Case Brief at 75-76; OFIA/OLMA Case Brief at 67. *See also* OFIA/OLMA/FTLC Comments at 13.

[5] *See* Tembec Case Brief at 52, 55-61; OFIA/OLMA Case Brief at 45, 48-54.

I.B.2.b.

Application Of Prices Observed In Independently Functioning Markets To Stumpage Set On The Administered Portion Of A Province's Harvest

Summary Of The Comment

The utilization of mill delivered wood costs would solve most perceived problems arising from adjustments required in translating prices from private transactions to crown transactions. Whatever prices are used, however, surveys of private market prices will remain the most efficient device for comparing private and public prices.

Comment

The NRDC demands that surveys of private transactions be banished, presumably as part of its campaign for complete public exposure of private transactions so that surveys would not be necessary. The central complaint, however, appears to be discerning the costs, not the prices. Mill delivered wood costs would solve this problem, as it would solve the problem of multiple complex adjustments,[1] but there is no way to escape surveys, for there is no plausible alternative for canvassing average market prices. The NRDC proposes no alternatives.

[1] *See* OFIA/OLMA/FLTC Comments at 37.

II.A. Auctions

Summary Of The Comment

The Department must not use the Bulletin as a vehicle for opening new disputes. The Department is demanding that British Columbia take back tenure, but cannot then try to punish British Columbia were it to compensate for such policy reform or, in the alternative, to try to prevent compensation through a threat of additional subsidy allegations.

The NRDC and the Coalition propose tight controls on the proposed new auction regime in British Columbia because they want to assure certain outcomes. Either auctions are to operate in an environment of free and competitive markets, or they are to be controlled and regulated by government and not be particularly free.

Comment

Many of the comments submitted to the Department concern British Columbia's plans to take back tenures and convert substantial portions of the harvest to auctions. Concerns include how much tenure will be converted; who will be able to bid in auctions; whether any major producers should be permitted to avoid participating in auctions; whether there will be compensation for withdrawn tenures; whether remaining tenures will be divisible and transferable.

The two main American submitters, the Coalition and the NRDC, are deeply divided on some of these issues. The Coalition wants tenures freely divisible and transferable, for example, while the NRDC does not. The Coalition insists that tenures are valuable, but does not want Canadian producers compensated for them, while the NRDC does not acknowledge any dilemma in this proposition and

categorically objects to compensation.

The Coalition wants to be sure that introduction of an auction system will not "artificially" expand timber supply. Consequently, the Coalition wants the new, free, open, transparent and competitive markets to be highly regulated and controlled by provincial governments to guarantee certain results of market operations. It concludes, for example, "As a general matter, no system which permits long-term harvests above AAC should be permissible,"[1] even were such a system a "truly competitive" "free" market, perhaps as imagined in the U.S. southeast where severe overcutting is routine.

The Coalition provides in this section a series of regulatory requirements for its new free and competitive markets. It demands, for example, that, "The Department should ensure that competitive markets also include a commercially reasonable reservation price,"[2] a condition that does not exist in Forest Service auctions. Hence, the Coalition does not want free and open markets. It wants regulated markets that assure, in the end, a reduction in the supply of timber.

The Department needs to clarify in the Bulletin that its commitment to competitive markets is not a commitment to any particular outcome. The theory of free markets is a theory that says the market knows best, not the government regulator.

The Coalition's discussion of Province A delivers a blunt message:

> While any CCR would require detailed testing and evaluation as the draft Bulletin indicates, id. at 37,642, the initial package of reforms proposed by BC appears insufficient to satisfy the legal standard for revocation.[3]

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[1] Coalition Comments at 38.

[2] *Id.*

[3] *Id.* at 41.

The Department must clarify how much will be enough for Province A, and whether when Province A embarks on reforms it has a reasonable expectation that the Bulletin contains for it an exit from the countervailing duty order, or whether the reforms will merely raise its costs without reward. The Coalition has provided a catalogue of Province A deficiencies. The Department must declare whether it endorses the Coalition's view.

II.B. Comparison With Prices Established In Other Jurisdictions

Summary Of The Comment

The NAFTA Binational Panel has confirmed the message from two WTO panels: the use of cross-border prices to determine adequate remuneration is contrary to international obligations and the laws of the United States. This section, therefore, is based on a proposition that is fundamentally illegal. It is also plagued by an empirical problem. Verifiable data are required, and the United States has been unable to provide verifiable data for private prices.

Comment

Province B is expected to use as a benchmark prices established in other jurisdictions. Even a binational panel prepared to defer to the Department in every imaginable way was not prepared to defer to the Department on this subject. "Fair market value" is not "adequate remuneration," and the benchmark or "reference price" (in the parlance of the Bulletin) cannot be in another jurisdiction.[1] The Department must rethink this section entirely.

The Department must also resist the Coalition's demands on this subject. The Coalition, like the Department, is concerned about the mechanism for translating prices from one jurisdiction to another. Such an arrangement is illegal, and refined modalities cannot make it legal.

The Coalition insists that adjustments must be verifiable, and seeks to place the burden for such verifiability on Province B. This problem can be solved, assuming a temporary, limited cross-border arrangement, only with a joint undertaking

[1] CVD NAFTA Panel Decision at 35.

between Canadian and U.S. interests, as essential data will be American and are not acceptable without being verified.[2] The better, more reliable solution, is to depend on Province B's domestic private market where information is more readily subject to verification.

[2] *See* Letter from the Ontario Forest Industries Association and the Ontario Lumber Manufacturers Association to Undersecretary Grant D. Aldonas, Case No. C-122-839 (Aug. 7, 2003), accessible on the U.S. Department of Commerce's website at: http://ia.ita.doc.gov/download/canada-softwood-lumber/olma-ofia-softwood-lumber-cmts.pdf .

III. Changed Circumstances Review

Summary Of The Comment

Revocation of the countervailing duty order must follow a successful changed circumstances review. Revocation is the end of the matter. There can be no partial revocation, monitoring, "snapbacks" or other provisions that continue to assert U.S. authority over the Canadian provinces post-revocation.

Comment

The NRDC and the Coalition summaries contain uncommonly common phrases and concepts about changed circumstances reviews. Both propose changed circumstances reviews which would be a gauntlet of faint hope and improbability, and both want the post-revocation world to be defined by continuous monitoring and potential U.S. interference in Canadian affairs. As the Coalition presents the proposition:

> Revocation should also be subject to several commitments. First, the applicant province must agree to maintain reforms for a reasonable period of time. Second, the province must agree not to 'pass-back' increased revenues or otherwise increase subsidies to the industry; this commitment should extend to operating regulations, such as forest practice codes. The formal revocation should provide for a set provisional period, during which the order would snapback in the event of demonstrated circumvention of commitments. (citations omitted)[1]

The authority cited for these propositions is the regulatory provision for partial revocation of a countervailing duty order, demonstrating that the Coalition does not perceive the Bulletin as a vehicle for ending the conflict at all. Indeed, it refers to an "amended order," and asks for an articulation of "proposed measures to ensure proper

[1] Coalition Comments at 49.

enforcement of the amended order."[2] Hence, to the Coalition, the Bulletin and its changed circumstances review is a vehicle to induce Canadian provincial governments to change radically their forest practices, in exchange for a continuing U.S. monitoring of those practices and a permanent license for American interference with Canadian sovereignty.

The Department must make absolutely clear that revocation of the countervailing duty order through a changed circumstances review is not partial or conditional or provisional: it must be definitive and total, or it is not imaginable how or why any provincial government would undertake to meet the demands of the Bulletin.

[2] *Id.* at 50.

REBUTTAL COMMENTS ON POLICY BULLETIN

PURPOSE OF THE POLICY BULLETIN

Summary Of The Comment

The primary purpose of the Policy Bulletin ("the Bulletin") is "to serve as the basis for a long-term, durable solution to the ongoing dispute between the United States and Canada over trade in softwood lumber."[1] A central feature of this purpose is the elimination of the alleged subsidy, which is determined according to "adequate remuneration." The Department has attempted to convert "adequate remuneration" into "fair market value," but a NAFTA Panel has now added its voice to the WTO chorus in declaring such a conversion illegal. The Department must therefore change the Bulletin fundamentally in setting the standard for policy reform. It must also clarify whether the Bulletin will require testing the effects of policy reforms before revoking the countervailing duty order.

Comment

Regrettably, many of the comments submitted to the Department of Commerce ("the Department") on the draft Bulletin misconstrue the Bulletin's purpose. According to the draft, the Bulletin's purpose is "to serve as the basis for a long-term, durable solution to the ongoing dispute between the United States and Canada over trade in softwood lumber and encourage the development of an integrated market for forest products consistent with the goals of the North American Free Trade Agreement and sustainable forestry."

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[1] *Proposed Policies Regarding the Conduct of Changed Circumstances Reviews of the Countervailing Duty Order on Softwood Lumber from Canada*, 68 Fed. Reg. 37456, 37457 (June 24, 2003) ("Policy Bulletin").

The Coalition for Fair Lumber Imports ("the Coalition") has bootstrapped to its comments on the purpose of the Bulletin a demand for an "interim measure to bridge the gap until policy reform can be implemented and tested through a CCR."[2] The Coalition argues that no Policy Bulletin should be promulgated "unless and until" there is an interim measure in place, and "supports the Policy Bulletin initiative as an important effort to . . . remove impediments to an interim agreement."[3]

One of the essential premises of the Bulletin is that the countervailing duty order remains in place. The countervailing duty order bridges any imagined gap. But tucked into the Coalition's sentence is still another proposition that pervades the Coalition's comments more generally: "until policy reform can be implemented and tested through a CCR."[4] The Coalition understands the Bulletin to require complete implementation and testing of policy reforms before the countervailing duty order can be revoked for any province, and it is apparent elsewhere in the Coalition's comments that it understands "tested' to mean an effects test.[5]

The Bulletin is ambiguous about effects tests. The Department must clarify, for the Coalition understands the Bulletin to require testing the effects of policy reforms before revoking the countervailing duty order, and such an understanding certainly is possible upon reading the draft.

Notwithstanding the NAFTA Binational Panel's woeful misunderstanding of the standard of review and its legal obligations, it did address a core issue of the Policy

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[2] Coalition Comments on Proposed Policies Regarding the Conduct of Changed Circumstances Reviews of the Countervailing Duty Order on Softwood Lumber from Canada, Case No. C-122-839 ("Coalition Comments") at 4.

[3] *Id*. at 5.

[4] *Id*. at 4.

[5] *Id.*

Bulletin correctly, concluding,

> In their briefs and in oral argument before the Panel, both the Coalition and the Department suggested than an appropriate measure of adequacy of remuneration would be 'fair market value,' or what the sellers of timber would receive absent the involvement of the government. Suffice it to say that these standards are not the law as reflected in the statute, the regulations, or even in the Preamble which speaks to actual market transactions as the preferred standard. The Panel rejects this argument.[6]

Hence, even the NAFTA Binational Panel, for all its profuse deference to the Department, could not accept "fair market value" as "adequate remuneration," which is the core proposition of the Bulletin.

With the complete repudiation of the Bulletin's core proposition – that Canadian provinces must undertake policy reforms so that stumpage will be set at "fair market value" – the Bulletin now requires some fundamental rethinking. Policy reforms, to the extent they are required or appropriate at all, must address the achievement of adequate remuneration, not fair market value, and as the NAFTA Panel has also concluded, "the statute requires an analysis based on market conditions in Canada."[7]

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[6] *In re Certain Softwood Lumber Products From Canada,* NAFTA Panel No. USA-CDA 2002-1904-03 (Aug. 13, 2003) (Final Decision of the Panel) ("CVD NAFTA Panel Decision"), at 35.

[7] *Id*. at 34.