

USTR NEWS

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USTR Disappointed with Tribunal's Mixed Decision on Softwood Lumber

Statement from Gretchen Hamel, USTR spokeswoman, on the issuance of the decision in the softwood lumber arbitration:

“We have received today the decision of the LCIA (formerly the London Court of International Arbitration) tribunal in a dispute under the 2006 Softwood Lumber Agreement between the United States and Canada (SLA). This arbitration concerns Canada’s implementation of the SLA’s surge mechanism and calculation of quota volumes.

“The tribunal agreed with the United States that Canada violated the SLA by failing to properly adjust the quota volumes of the Eastern Canadian provinces in the first six months of 2007 to account for rapidly changing market conditions. However, the tribunal disagreed with the United States in finding that the same adjustment is not required for the Western provinces.

“We appreciate the tribunal’s professionalism and diligence in adhering to the expedited timetable established by the SLA for this arbitration, but we respectfully disagree with the key result. The SLA brought about an end to more than twenty years of litigation, and it was crafted as a balanced set of rights and obligations for both the United States and Canada. The viability of the SLA is dependent on maintaining that balance. The tribunal’s decision regarding the calculation of the trigger volumes for the Western Canadian provinces is not consistent with the balance we negotiated under the SLA. While we remain committed to the long-term goal of market-based trade in lumber, we will be consulting with our stakeholders on options going forward.”

Background

Under the SLA, Canada agreed to impose export measures on Canadian exports of softwood lumber products to the United States. When the prevailing monthly price of lumber, determined per the Agreement, is above US\$355 per thousand board feet (MBF), Canadian lumber exports are unrestricted. When prices are at or below US\$355 per MBF, each Canadian exporting region has chosen to be subject to either an export tax with a soft volume cap or a lower export tax with a hard volume cap or “volume restraint.” The measures become more stringent as the market

price of lumber declines. Today, the prevailing monthly price of lumber is US\$243 per MBF and the Western Canadian provinces are subject to the maximum export charge of 15 percent, while the Eastern provinces face the most stringent volume restraints provided under the Agreement in addition to an export charge of 5 percent (the maximum possible for those provinces).

The SLA includes an adjustment mechanism to ensure that the export volume caps are calculated appropriately under rapidly changing market conditions. The United States argued that Canada breached the SLA by waiting until July 2007 – instead of January 2007 – to make downward adjustments for the Eastern provinces and by failing to make any adjustments for British Columbia (BC) and Alberta. In the view of the United States, Canada’s failure to make the downward adjustments resulted in greater levels of shipments from Canada than were allowed under the Agreement, which exacerbated already difficult market conditions. The tribunal found that Canada is required to make a downward adjustment only to the export volume caps for the Eastern provinces, but not for BC and Alberta. The tribunal did agree with the United States that Canada needed to make these adjustments beginning in January 2007, not July 2007. At present, Canada continues to make the downward adjustment when calculating volume restraints for the Eastern provinces. Had the tribunal found that the adjustment also applied to the Western provinces, this would have resulted in additional surge penalties only for certain months, primarily from January 2007 – June 2007. The Western provinces would not be subject to surge penalties at the present time due to current market conditions.

The SLA entered into force on October 12, 2006, and is expected to remain in force for seven years, with the possibility of extension for an additional two years. The SLA provides for binding arbitration to resolve disputes between the United States and Canada regarding interpretation and implementation of the Agreement. Under the SLA, arbitration is conducted under the rules of the LCIA, and there is no appeal from the decision of the tribunal.

On January 18, 2008, the United States requested through the Department of Justice a second arbitration on a separate issue. Under the SLA, the United States and Canada committed to not take action to circumvent the commitments made in the Agreement. The SLA expressly states that providing certain grants or other benefits to Canadian softwood lumber producers circumvents the Agreement. Quebec and Ontario have put in place several assistance programs that provide grants or other benefits to softwood lumber producers that violate the SLA’s anti-circumvention provisions. These include a number of grant, loan, loan guarantee, and tax credit programs, as well as so-called “forest management” programs and programs that promote wood production. Pursuant to the SLA, the tribunal in that arbitration shall endeavor to issue a decision within 180 days of its composition.

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