WORLD TRADE ORGANIZATION

WT/DS139/12
WT/DS142/12
4 October 2000

(00-4001)

CANADA – CERTAIN MEASURES AFFECTING THE AUTOMOTIVE INDUSTRY

Arbitration
under Article 21.3(c) of the
Understanding on Rules and Procedures
Governing the Settlement of Disputes

I. Introduction

1. On 19 June 2000, the Dispute Settlement Body (the "DSB") adopted the Appellate Body Report[1], and the Panel Report[2] as modified by the Appellate Body Report, in *Canada – Certain Measures Affecting the Automotive Industry* ("*Canada – Automotive Industry*"). On 19 July 2000, Canada informed the DSB, pursuant to Article 21.3 of the *Understanding on Rules and Procedures*

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II. Arguments of the Parties

A. *Canada*

5. Canada submits that the "reasonable period of time" needed for full compliance with the recommendations and rulings of the DSB relating to the Canadian value-added requirements (the "CVA requirements") and the duty exemption is "11 months, 12 days", that is, until 1 May 2001. In its written submission, Canada proposes to implement these recommendations and rulings through the repeal or amendment of the Motor Vehicles Tariff Order, 1998 (the "MVTO 1998")[6] and the Special Remission Orders (the "SROs")[7] promulgated by the Government of Canada.

6. Canada noted that it was on schedule to withdraw the export subsidy component of the measures, namely the production-to-sales ratio requirements, by 17 September 2000, as recommended by the DSB. However, to do so, Canada "drastically foreshortened" its normal law-making process. Canada's ability to withdraw the export subsidy component so quickly has no bearing on the "reasonable period of time" for implementing recommendations and rulings of the DSB relating to the CVA requirements and the duty exemption.

7. Canada argues that for these aspects of the measures at issue, the normal rules for determining a "reasonable period of time" under Article 21.3(c) arbitrations apply. According to Canada, past Arbitrators have recognized the sovereign prerogative of Members to determine the most appropriate and effective method of implementing the recommendations and rulings of the DSB, including the choice and timing of the steps necessary to do so. Canada states that the "reasonable period of time" which it has proposed is based on this rule.

8. Canada notes that it will implement the recommendations and rulings through administrative measures, and explains the regulation-making process in Canada as follows.

9. In Canada's legal system, the basic process to be followed for the making of regulations is prescribed by the Statutory Instruments Act and the Government of Canada Regulatory Policy (the "Regulatory Policy"). The Regulatory Policy imposes a succession of steps on authorities

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[6]The MVTO 1998 is a regulation promulgated by the Governor-General-in-Council, on the recommendation of the Minister of Finance, under the authority of the Customs Tariff, S.C. 1997, c. 36, subsections 14(2) and 16. See Panel Report, *Canada – Automotive Industry*, WT/DS139/R, WT/DS142/R, adopted 19 June 2000, as modified by the Appellate Body Report, footnote 24.

[7]The SROs are regulations promulgated by the Governor-General-in-Council, on the recommendation of the Minister of Finance and the Minister of Industry, under the authority of the Financial Administration Act, R.S.C. 1985, c. F-11, s. 23. *Ibid*., footnote 25.

sponsoring regulations, as well as obligations of transparency and consultation. Canada explains that the length of time required for each of the steps in the regulatory process depends on both the nature and the consequences of the proposed regulation. The Federal Regulatory Process Guide (the "Process Guide") elaborates the process for obtaining approval for Governor-in-Council regulations.

10. Once the Canadian government has identified a problem, it is required to consult with all concerned stakeholders in order to determine the key elements of the issue, identify the best course of action for remedying the situation, and allow Canadians an opportunity to participate in developing or modifying regulations and regulatory programs. Consultation occurs prior to the drafting of the regulations and following "pre-publication" of the draft regulations.

11. In the normal course of events, the department with responsibility for the area in which the problem has arisen (in this case, Canada's Department of Finance) will include information about the problem in its Report on Plans and Priorities, a document which is tabled in Parliament. Where this is not possible, in order to ensure that the public is involved in isolating and defining the problem and selecting a solution, the department may use other forms of early notice. For example, the department may publish a "Notice of Intent" seeking public advice and comment.

12. The responsible department is then required to draft a proposed regulation. It must also prepare a Regulatory Impact Analysis Statement ("RIAS"), which describes the purpose of the draft regulation, the alternatives considered, a benefit-cost analysis, the results of consultations with interested parties, the department's response to the concerns raised, and how the regulation will be enforced. The RIAS is to be drafted both to provide concise information for decision-makers, and to give the public the information it needs to evaluate and comment upon a regulatory proposal.

13. Once the proposed regulation and supporting documentation, including the RIAS, have been prepared in both of Canada's official languages and approved by the responsible department's legal services and senior management, they must be sent to three central agencies. The Department of Justice must examine the regulation to ensure that it has a proper legal basis and is not inconsistent with the *Canadian Charter of Rights and Freedoms* or the *Canadian Bill of Rights*. The Clerk of the Privy Council Office ("PCO") must ensure that the proposal is consistent with the government's overall program, and that the responsible department has adequately considered the communications aspects of the proposed regulatory action. The Regulatory Affairs and Orders-in-Council Secretariat of the PCO must review the proposal in order to ensure that it is consistent with the Regulatory Policy and, in particular, that: the responsible department has considered alternatives; the benefits of the regulation or amendments clearly outweigh the costs; adequate consultation with the public has taken place; and the responsible department has cooperated with Canada's provincial governments.

14. Once the foregoing reviews have been completed, the Minister of the responsible department approves the regulation and supporting documentation and submits them to the PCO for consideration by the Cabinet's Special Committee of Council ("SCC"). The SCC is the Cabinet committee that gives Governor-in-Council approval for the pre-publication of a draft regulation and its accompanying RIAS.

15. The Regulatory Policy requires pre-publication of a regulation in order to provide the Canadian public at large with an opportunity to comment. Upon approval by the SCC ministers, the regulation and its RIAS are pre-published in the *Canada Gazette*, Part I, and are open for public comment for a minimum period of 30 days. This period will vary from case-to-case depending on the impact of the proposed regulatory changes and the extent of the consultation that occurred prior to drafting. Comments received from the public must be weighed on their merits and changes to the proposed regulation must be considered. If the proposed regulation is changed, the Department of Justice must again examine and approve the revised version before it is sent to the SCC for final approval by the ministers. If the proposed regulation is amended, its RIAS must also be changed to reflect the amendment.

16. If the ministers approve the regulation, it is registered under a statutory orders and regulations number within seven days. The regulation will come into force on a date specified or, where not so specified, on the day of registration.

17. The approved regulation and its RIAS are then forwarded for publication in the *Canada Gazette*, Part II. Pursuant to subsection 11(1) of the Statutory Instruments Act, publication must take place no later than 23 days after registration. Once published, the regulation becomes enforceable as law, since the public is deemed to have notice of the change in the regulatory regime.

18. Canada presents a chart in which it estimates the time needed for each stage of the implementation process. Canada submits the following estimated periods. First, Canada estimates 150 days for the "Pre-Drafting" process, including identification and assessment of the problem and publication of a Notice of Intent in the *Canada Gazette*. Then, Canada estimates 178 days for the "Drafting/Approval Process", which includes the following time periods: 60 days for drafting the proposed regulation and completing the RIAS, submission to central agencies, submission to PCO for SCC approval, and SCC decision, followed by pre-publication in the *Canada Gazette*; 30 days for receipt of questions and comments from the public; 30 days for a response to the public questions and comments; 30 days for the amendment of the regulation and the RIAS as required; 14 days for submission to PCO for SCC final approval; 7 days for SCC final approval and signature of the Governor General; and 7 days for registration of the regulations.

19. In addition, Canada submits that two other factors are relevant in determining the "reasonable period of time" in this dispute. First, the elimination of the customs duty exemption for motor vehicles has significant implications for the administration of Canada's customs regime. The Government of Canada is currently undertaking a major re-engineering of customs operations to develop enhanced processes available to all importers. A new customs system, known as "Customs Self-Assessment", or "CSA", will streamline the import process. Because qualifying manufacturers under the Agreement Concerning Automotive Products Between the Government of Canada and the Government of the United States of America (the "Auto Pact")[8], are the largest users of Canada's customs system, Canada's measures to comply with the recommendations and rulings of the DSB in this dispute must fully address the planned CSA system. In making the changes necessary to comply with the recommendations of the DSB, the Government of Canada has a responsibility to find ways to avoid administrative delays and other trade disruptions resulting from a change in tariff regimes and to ensure the earliest transition to the new CSA system. At the oral hearing, Canada cited previous arbitration awards as establishing a preference for full and effective implementation[9], and as allowing a period for transition to replacement measures as part of the "reasonable period of time".[10]

20. Second, Canada argues that its treaty obligations under the Auto Pact must be taken into account in determining the "reasonable period of time". Under the Auto Pact, Canada is required to accord duty-free treatment to motor vehicles from the United States, if they are imported by manufacturers that meet certain conditions. Since Canada will have to eliminate this duty-free treatment in order to comply with the recommendations of the DSB, Canada will have to strike a balance between its co-existing international obligations. To achieve this balance, Canada considers that it will need to consult with the United States. During the oral hearing, Canada clarified that it is not seeking to extend the "reasonable period of time" because of such consultations, as it believes that such consultations can be carried out simultaneously with the regulatory reform needed for implementation.

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[8]See 4 International Legal Materials 302.

[9]Canada's Oral Statement, para. 23 (citing Award of the Arbitrator under Article 21.3(c) of the DSU, *Chile – Taxes on Alcoholic Beverages* ("*Chile – Alcoholic Beverages*"), WT/DS87/15, WT/DS110/14, 23 May 2000).

[10]Canada's Oral Statement, para. 26 (citing Award of the Arbitrator under Article 21.3(c) of the DSU, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/15, 7 January 1998; Award of the Arbitrator under Article 21.3(c) of the DSU, *Australia – Measures Affecting Importation of Salmon* ("*Australia – Salmon*"), WT/DS18/9, 23 February 1999).

B. *European Communities*

21. The European Communities notes that the DSB's recommendations gave Canada 90 days to withdraw the export subsidy component of the measures found to be inconsistent with Canada's WTO obligations. With regard to the aspects of the measures that were found to be inconsistent with Article I:1 and Article III:4 of the GATT 1994 and Article XVII of the GATS, Canada's obligation was to brings its measures into conformity with its obligations under these provisions. The European Communities notes that Canada indicated that it would require a "reasonable period of time" for implementation of these aspects of the measures under Article 21.3(c), as Canada considered that it would be "impracticable" to comply with the recommendation "immediately".

22. The European Communities submits that the 15 month period mentioned in Article 21.3(c) for the "reasonable period of time" is a "guideline" for the arbitrator, not an "average" or "usual" period. The European Communities argues that past arbitrations make clear that the "reasonable period of time" should be the shortest period of time possible within the legal system of the Member to implement the recommendations and rulings of the DSB. Article 21.3(c) refers to the notion of "particular circumstances" that can influence the "reasonable period of time". The "particular circumstances" of each case determine the length of this period.

23. Examining the "particular circumstances" of this dispute, the European Communities considers that a period of three months from the adoption of the Panel and Appellate Body reports, that is, until 17 September 2000, is a "reasonable period of time" for implementation. The European Communities' assessment is based on the following "particular circumstances".

24. The European Communities first notes that the MVTO 1998 and the SROs are not legislative acts, but regulations in the form of Orders in Council, which can, therefore, be amended or repealed by means of another Order in Council. The European Communities further argues that most of the steps in Canada's regulation making process are not subject to any deadlines, either mandatory or indicative. As a result, there is a large measure of discretion for the Canadian administrative authorities to act promptly if they wish to do so.

25. Next, the European Communities submits that the "problem" requiring the adoption of a regulation has already been clearly identified by the DSB's recommendations, and the Government of Canada has stated that it has consulted with "stakeholders" throughout the WTO dispute process, so their views are well-known. The European Communities also states that the implementing options are limited since Canada has no choice but to repeal the MVTO 1998 and the SROs, and the drafting of

such a regulatory change is a simple task. Moreover, given that repeal is the only option, comments from the public cannot result in much alteration of the proposed regulatory text.

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42. I now turn to an examination of the arguments made by Canada, the European Communities and Japan in order to determine what would be a "reasonable period of time" in the "particular circumstances" of this dispute.

43. In its written submission, Canada requested "11 months, 12 days" from the adoption of the Panel and Appellate Body Reports on 19 June 2000 for implementation, which, according to Canada, is until 1 May 2001.[17] I note that the period from 19 June 2000 to 1 May 2001 is actually 10 months and 12 days. Howev -1qta

justification as to why it cannot also implement the DSB's recommendations at issue here within 90 days.

46. In the present case, the parties agree that the measures at issue are certain regulations of the Government of Canada, namely the MVTO 1998 and the SROs. In the oral hearing, Canada stated that "in all likelihood" it would implement the DSB's recommendations through the repeal of these

regulations. Two of the steps proposed by Canada illustrate the generous nature of the estimates provided by Canada.

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51. In my view, Canada's proposal does not make sufficient use of the discretion built into the Regulatory Policy to achieve the "prompt" compliance required by Article 21.1 of the DSU.

52. The European Communities and Japan have both argued that Canada should be able to implement the DSB's recommendations here at issue within 90 days. The European Communities and Japan argue that since Canada was able to implement the DSB's recommendations under Article 3.1(a) of the *SCM Agreement* within 90 days, it should be able to implement the DSB's recommendations relating to Article I:1 and Article III:4 of the GATT 1994 and Article XVII of the GATS within 90 days as well.

53. I agree with Canada, taking account of the normal process for adopting regulations in Canada, that 90 days does not constitute a "reasonable period of time" for implementation of the DSB's recommendations relating to Article I:1 and Article III:4 of the GATT 1994 and Article XVII of the GATS.[28] In its written submission, Canada confirmed that it intends to withdraw the export subsidy

"Customs Self-Assessment".[32] This reform process was begun at the end of 1999, and the legislation necessary to effect it is scheduled to be introduced into Parliament this fall. This reform is a continuing process, with the final phase of implementation to begin in late April 2001, and the testing of the system with clients to continue through 2004.[33] The relevance of the implementation of this new customs administration system to Canada's argument on the "reasonable period of time" for implementation is not clear. In its written submission, Canada appears to be arguing that the establishment of the new customs system would require a *delay* in implementation of the DSB's recommendations in this case.

IV. The Award

56. I determine that the "reasonable period of time" for Canada to implement the recommendations and rulings of the DSB relating to Article I:1 and Article III:4 of the GATT 1994 and Article XVII of the GATS in this case is *8 months* from the date of adoption of the Appellate Body Report and the Panel Report, as modified by the Appellate Body Report, by the DSB on 19 June 2000. The "reasonable period of time" will thus expire on *19 February 2001*.

Signed in the original at Geneva this 18th day of September 2000 by:

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Julio Lacarte-Muró