

***UNITED STATES – FINAL COUNTERVAILING DUTY DETERMINATION
WITH RESPECT TO CERTAIN SOFTWOOD LUMBER FROM CANADA***

Recourse to Article 21.5 of the DSU by Canada

(WT/DS257)

**FIRST SUBMISSION AND REQUEST FOR PRELIMINARY RULING
OF
THE UNITED STATES**

March 10, 2005

I. Introduction

1. On December 6, 2004, the U.S. Department of Commerce (“Commerce”) issued a revised determination (“Section 129 Determination”)¹ that implemented the recommendations and rulings of the Dispute Settlement Body (“DSB”) in *United States – Final Countervailing Duty Determination With Respect to Certain Softwood Lumber From Canada*.² The recommendations and rulings of the DSB at issue relate to Commerce’s decision not to conduct a pass-through analysis with respect to certain arm’s-length sales of logs in its Final Determination.³

2. As discussed further below, Commerce’s Section 129 Determination fully implements the recommendations and rulings of the DSB, and is consistent with the *Agreement on Subsidies and Countervailing Measures* (“SCM Agreement”) and the *General Agreement on Tariffs and Trade 1994* (“GATT 1994”). The Panel should find, therefore, that Canada’s claims are unfounded.

3. In addition, as set out below, the United States requests a preliminary ruling that the final results of the first assessment review⁴ of the countervailing duty order on softwood lumber from Canada, cited by Canada in its request for the establishment of a panel,⁵ are not “measures taken to comply” with the recommendations and rulings of the DSB under Article 21.5 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (“DSU”). Therefore, these results fall outside the scope of Article 21.5, and this Panel lacks jurisdiction to review them.

4. As provided for in the Panel’s working procedures, the United States will be providing a rebuttal submission on March 31, 2005.

¹ *Section 129 Determination: Final Countervailing Duty Determination, Certain Softwood Lumber from Canada*, December 6, 2004 (“Section 129 Determination”) (Exhibit CDA-5). “Section 129” refers to the provision of the Uruguay Round Agreements Act that provides procedures for implementing certain DSB recommendations and rulings with respect to countervailing duty investigations.

² Appellate Body Report, WT/DS257/AB/R, adopted 17 February 2004, (“Appellate Body Report”); Panel Report, WT/DS257/R, adopted 17 February 2004 (“Panel Report”).

³ *Notice of Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination: Certain Softwood Lumber Products from Canada*, 67 Fed. Reg. 15545 (April 2, 2002), as amended, 67 Fed. Reg. 36070 (May 22, 2002) (“Final Determination”). Exhibit US-1.

⁴ An “administrative review”, in U.S. parlance.

⁵ WT/DS257/15, citing *Notice of Final Results of Countervailing Duty Administrative Review and Recission of Certain Company-Specific Reviews: Certain Softwood Lumber Products from Canada*, 69 Fed. Reg. 75,917 (Dep’t Commerce December 20, 2004) (Exhibit CDA-8) and *Issues and Decision Memorandum: Final Results of Administrative Review: Certain Softwood Lumber Products from Canada*, December 13, 2004.

II. Procedural History

5. On April 2, 2002, Commerce published the Final Determination, finding that provincial stumpage programs in Canada provided a countervailable subsidy to Canadian lumber producers and that certain non-stumpage programs provided countervailable subsidies.⁶ Commerce did not conduct a pass-through analysis in the Final Determination.

6. On May 3, 2002, Canada requested consultations with the United States and thereafter the DSB established a panel pursuant to Article 6 of the DSU (“original panel”).

7. On August 29, 2003, the original panel found that Commerce’s failure to conduct a pass-through analysis in the Final Determination with respect to arm’s-length sales to unrelated sawmills and lumber remanufacturers was inconsistent with Articles 10 and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994.⁷ However, the Appellate Body in its January 19, 2004, report reversed that aspect of the original panel report relating to Commerce’s decision in its investigation not to conduct a pass-through analysis in respect of arm’s-length sales of lumber by tenured harvesters/sawmills to remanufacturers.⁸

8. The Appellate Body upheld, however, the original panel’s finding that Commerce acted inconsistently with the SCM Agreement and GATT 1994 by failing in the Final Determination to conduct a pass-through analysis in respect of arm’s-length sales of logs by tenured harvesters/sawmills to unrelated sawmills.⁹ On February 17, 2004, the DSB adopted its recommendations and rulings.¹⁰

9. On March 5, 2004, the United States notified the DSB of its intention to implement the recommendations and rulings of the DSB.¹¹ Thereafter, the United States and Canada established a ten-month “reasonable period of time” ending December 17, 2004, within which the United States agreed to implement the recommendations and rulings of the DSB.¹²

10. On November 19, 2004, Commerce issued a draft Section 129 Determination and provided an opportunity for parties to comment. On December 6, 2004, Commerce issued the Section 129 Determination, which revised the original countervailing duty investigation

⁶ The Final Determination subsequently was amended on May 22, 2002.

⁷ Panel Report, para. 7.99.

⁸ Appellate Body Report, para. 167(f). The United States did not appeal the Panel’s findings with respect to arm’s-length log sales between tenured timber harvesters not owning sawmills and sawmills. Appellate Body Report, fn. 157.

⁹ The other issues either appealed by the United States or Canada were decided in favor of the United States. Appellate Body Report, para. 167.

¹⁰ DSB, Minutes of Meeting (17 February and 19 March, 2004), WT/DSB/M/165, March 30, 2004, at 4(a), para. 49.

¹¹ WT/DS257/12, March 9, 2004.

¹² WT/DS257/13, April 30, 2004.

determination and implemented the DSB’s recommendations and rulings, effective for imports on or after December 10, 2004. On December 16, 2004, the notice of implementation was published in the Federal Register.¹³

11. On December 17, 2004, the United States informed the DSB that it had complied with the DSB’s recommendations and rulings by properly conducting its pass-through analyses of certain arm’s-length log sales occurring during the period of investigation (“POI”).

III. Preliminary Ruling Request with Respect to the Final Results of the First Assessment Review

12. The United States requests a preliminary ruling that the final results of the first assessment review of the countervailing duty order on softwood lumber from Canada, cited by Canada in its request for the establishment of a panel in this dispute,¹⁴ are not “measures taken to comply” with the recommendations and rulings of the DSB under Article 21.5 of the DSU. Therefore, these results fall outside the scope of Article 21.5, and this Panel lacks jurisdiction to review them.

A. Article 21.5 Proceedings are Limited to “Measures Taken to Comply” With the DSB’s Recommendations and Rulings

13. The subject matter of these proceedings is determined by the Panel’s terms of reference and by Article 21.5 of the DSU, which provides that recourse be had to dispute settlement procedures “[w]here there is disagreement as to the existence or consistency with a covered agreement of *measures taken to comply with the recommendations and rulings.*” (emphasis added). Therefore, as the Appellate Body has stated, “[p]roceedings under Article 21.5 do not concern just *any* measure of a Member of the WTO; rather Article 21.5 proceedings are limited to those ‘*measures taken to comply with the recommendations and rulings*’ of the DSB.”¹⁵

14. Although the complaining party in an Article 21.5 proceeding decides the scope of its request for panel establishment, including the measures it wishes to challenge, it is the responsibility of the Article 21.5 panel to determine whether the measure identified is or is not a

¹³ *Notice of Implementation Under Section 129 of the Uruguay Round Agreements Act; Countervailing Measures Concerning Certain Softwood Lumber Products From Canada*, 69 FR 75305 (December 16, 2004). Exhibit CDA-7.

¹⁴ WT/DS257/15, citing *Notice of Final Results of Countervailing Duty Administrative Review and Recission of Certain Company-Specific Reviews: Certain Softwood Lumber Products from Canada*, 69 Fed. Reg. 75,917 (Dep’t Commerce December 20, 2004) (Exhibit CDA-8) and *Issues and Decision Memorandum: Final Results of Administrative Review: Certain Softwood Lumber Products from Canada*, December 13, 2004.

¹⁵ Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted August 20, 1999, para. 36.

“measure[] taken to comply”.¹⁶ If it is not, the measure falls outside of Article 21.5, and the panel lacks jurisdiction to review the measure. As the panel in *EC – Bed Linens* stated, it is neither the complaining nor the responding party that decides which measures are taken to comply: “Rather,” said the panel, “this is an issue which must be considered and decided by an Article 21.5 panel.”¹⁷ That panel concluded that “[t]o the extent a party may have challenged, in a request for establishment of an Article 21.5 panel, measures which were not ‘taken to comply’ by the implementing Member, it is our view that a Panel may decline to address claims concerning such measures.”¹⁸

15. And, indeed, in the *EC – Bed Linens* dispute, the panel granted the EC’s preliminary ruling request to exclude from consideration certain antidumping duty measures taken by the EC that were cited by India, but that the panel found were not “taken to comply.” In that dispute, in which the EC was found to have incorrectly calculated dumping duties in an investigation of bed linens from India, the EC voluntarily applied the revised calculation method to antidumping duties imposed on Pakistan and Egypt. After concluding that no duties should be imposed on bed linens from those sources (as a result of the recalculation), the EC re-examined whether imports from India, considered alone, caused injury to the domestic industry. The EC concluded that they did, and therefore affirmed the imposition of dumping duties on bed linen from India. India challenged this finding of injury and the resulting imposition of duties on bed linen from India as a WTO-inconsistent measure “taken to comply” under Article 21.5.

16. The panel, in deciding not to review the latter measure, stated that

[T]he fact that the EC, subsequent to its re-examination of the dumping determinations with respect to imports from Egypt and Pakistan, and in the context of a review initiated on the request of Eurocoton, carried out an analysis of whether injury was caused by imports from India alone does not, *ipso facto*, establish that Regulation 696/2002 is a measure “taken to comply”. Rather the opposite would seem to be the case – that Regulation would seem to be an entirely new determination, reached as a result of events subsequent to the EC having adopted a measure to comply with the DSB’s recommendation.¹⁹

17. In sum, Article 21.5 proceedings are limited to “measures taken to comply” with the DSB’s recommendations and rulings. As discussed below, the final results of the first assessment review are not “measures taken to comply” and therefore this Panel should decline to review those results.

¹⁶ See, e.g., Panel Report, *European Communities - Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India - Recourse to Article 21.5 of the DSU by India*, WT/DS141/RW, adopted 24 April 2003, as modified by the Appellate Body Report, WT/DS141/AB/RW, (“*EC – Bed Linens (Panel)*”), para. 6.15.

¹⁷ *EC – Bed Linens* (Panel), para. 6.15.

¹⁸ *EC – Bed Linens* (Panel), para. 6.17 (emphasis in original).

¹⁹ *EC – Bed Linens* (Panel), para. 6.20 (emphasis added).

B. The Final Results of the First Assessment Review Are Not “Measures Taken to Comply”

18. As discussed above, before the original panel, Canada challenged Commerce’s Final Determination in the countervailing duty *investigation* on softwood lumber from Canada.²⁰ After the DSB adopted its recommendations and rulings, and within the agreed “reasonable period of time”, the United States made a redetermination – the Section 129 Determination – in which it conducted a “pass through” analysis and recalculated the countervailing duty rate.²¹ The new reduced rate was applicable to entries of subject merchandise on or after December 10, 2004.²²

19. In this Article 21.5 dispute, Canada states that the Section 129 Determination is a “measure[] taken to comply with the recommendations and rulings” of the DSB and alleges that it fails to implement the recommendations and rulings of the DSB.

20. But Canada also includes, without explanation, a completely separate Commerce determination, *i.e.*, the results of an *assessment review*, among the “measures taken to comply” which it asks the Panel to examine under Article 21.5. The results of this assessment review are, in no sense, “measures taken to comply” with the recommendations and rulings of the DSB concerning the Final Determination in the original countervailing duty investigation.

21. As an initial matter, original investigations and assessment reviews are different processes which serve distinct purposes. The purpose of an investigation is to determine the existence, degree, and effect of any alleged subsidy; the purpose of an assessment review is to determine the amount of duty to be assessed on previous imports of subject merchandise and the estimated countervailing duty rate to be applied to future imports. Indeed, the distinction between countervailing duty investigations and assessment procedures is explicitly recognized in the SCM Agreement.²³

22. In May 2003, Canada (among other interested parties) requested such an assessment review, covering entries of subject merchandise during the period May 22, 2002, through March 31, 2003. The resulting assessment review was not taken to comply with the recommendations and rulings of the DSB. Rather, it resulted from a *separate* affirmative request by Canada, among others, that Commerce review *new* sales and subsidies data for the purposes of assessing countervailing duties for imports during the review period and of setting a new estimated countervailing duty rate for subsequent imports. U.S. law required Commerce to conduct this assessment review once Canada, among others, requested it.²⁴

²⁰ Panel Report, paras 2.1 - 2.4.

²¹ Section 129 Determination. Exhibit CDA-5.

²² *Notice of Implementation under Section 129 of the Uruguay Round Agreements Act: Countervailing Measures concerning Certain Softwood Lumber from Canada*, 69 Fed. Reg. 75,917 (Dep’t Commerce December 16, 2004). Exhibit CDA-7.

²³ *See, e.g.*, SCM Agreement, fn. 52.

²⁴ *See* 19 USC 1675(a). Exhibit US-2.

23. Indeed, the assessment review was initiated on July 1, 2003, *eight months* before the recommendations and rulings in this dispute were adopted. This review proceeding, therefore, had nothing whatsoever to do with “implementing” the DSB's recommendations and rulings. For obvious temporal reasons, the results of this assessment review – which was initiated before the DSB issued its recommendations and rulings – cannot be considered “measures taken to comply”.

24. Article 21.5 proceedings are by their nature more focused and limited than other panel proceedings under Article 6.2 of the DSU. Notably, instead of six months, the DSU anticipates that Article 21.5 proceedings will normally take no more than 90 days.²⁵ Canada, for its part, has underscored this aspect of these proceedings by systematically opposing any extensions of time in this proceeding.²⁶ For this reason, Article 21.5 proceedings are intended to focus, not on *any* measure cited by the complaining Member – as is the case for other dispute settlement proceedings – but only on *measures taken to comply* with DSB recommendations and rulings. It is beyond the scope of such a limited 90-day inquiry to fully examine an entirely new set of assessment review results based on a wholly new administrative record, consisting of new sales, new imports, potentially new respondents and potentially new subsidy programs.

25. In sum, in this Article 21.5 proceeding, the Panel lacks jurisdiction to review the final results of the assessment review cited by Canada because these results are not “measures taken to comply” with the DSB’s recommendations and rulings, adopted on February 17, 2004, related to Commerce’s Final Determination in the original countervailing duty investigation.

IV. Canada Bears the Burden of Proving Its Claims

26. It is well-established that the complaining party in a WTO dispute bears the burden of coming forward with argument and evidence that establish a *prima facie* case of a WTO inconsistency.²⁷ If the balance of evidence and argument is inconclusive with respect to a particular claim, Canada, as the complaining party, must be found to have failed to establish that claim.²⁸ Canada has not met its burden in this proceeding.

²⁵ Compare Articles 12.8 and 21.5 of the DSU.

²⁶ Recall, *e.g.*, statements by the Canadian representative during the Panel organization meeting of February 14, 2005, as well as paragraph 2 of Canada’s letter of February 15, 2005, to the Panel regarding its draft working procedures and timetable.

²⁷ See, *e.g.*, Appellate Body Report, *United States – Measures Affecting Imports of Woven Shirts and Blouses from India*, WT/DS33/AB/R, adopted 23 May 1997, page 14; Appellate Body Report, *European Communities – Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, para. 104; and Panel Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/R, as modified by the Appellate Body, adopted 12 January 2000, para. 7.24.

²⁸ See, *e.g.*, Panel Report, *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/R, as affirmed by the Appellate Body, adopted 22 September 1999, para. 5.120.

27. With respect to the standard of review, Article 11 of the DSU sets forth the standard of review for this Panel. Article 11 calls for panels to “make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements”

28. With respect to disputes involving a determination made by a domestic authority based upon an administrative record, the Appellate Body, in *Cotton Yarn*, summarized the role of a panel under Article 11 as follows:

[P]anels must examine whether the competent authority has evaluated all relevant factors; they must assess whether the competent authority has examined all the pertinent facts and assess whether an adequate explanation has been provided as to how those facts support the determination; and they must also consider whether the competent authority’s explanation addresses fully the nature and complexities of the data and responds to other plausible interpretations of the data. However, panels must not conduct a *de novo* review of the evidence nor substitute their judgement for that of the competent authority.²⁹

29. Thus, the Panel’s task is to determine whether a reasonable, unbiased person, looking at the same evidentiary record as Commerce, could have – not would have – reached the same conclusions.

V. Commerce Conducted a Pass-Through Analysis Consistent with the SCM Agreement, the GATT 1994, and the DSB’s Recommendations and Rulings

30. As described in detail in the Section 129 Determination, Commerce responded to the DSB’s recommendations and rulings by conducting a pass-through analysis, first issuing questionnaires seeking record evidence to determine whether during the period of investigation there were arm’s-length sales of logs by independent harvesters to unrelated sawmills and by tenured harvesters/sawmills to unrelated sawmills. Based upon its analysis of the record evidence, Commerce determined that there were such arm’s-length log sales. For those arm’s-length sales, Commerce then determined whether a benefit was passed through to the purchasing sawmills, using appropriate benchmarks, and removed from the numerator of the aggregate subsidy calculation any benefit that it found did not pass through to the purchasing sawmills.

31. Other sales, however, were determined not to be at arm’s length, either because the record facts demonstrated that they were not or because Canada failed to provide sufficient record evidence that would have enabled Commerce to analyze those sales. Ultimately, Commerce’s analysis of log sales demonstrated to be at arm’s length resulted in a C\$28,344,121

²⁹ Appellate Body Report, *United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan*, WT/DS192/AB/R, adopted 5 November 2001, para. 74.

reduction in the numerator of the *ad valorem* subsidy rate, which had the effect of reducing the country-wide subsidy rate from 18.79 percent *ad valorem* to 18.62 percent *ad valorem*.³⁰

32. Canada now challenges Commerce’s Section 129 Determination under Article 21.5 of the DSU. This challenge, however, has no basis in the SCM Agreement, the GATT 1994, or the recommendations and rulings of the DSB. Commerce’s pass-through analysis was conducted in accordance with the recommendations and rulings of the DSB and is WTO-consistent, and Canada’s claims must therefore fail.

33. First, Commerce did not “presume” pass-through. To implement the DSB’s recommendations and rulings, Commerce sought data from Canada substantiating its claims that subsidies were not passed through. In some instances, the Canadian respondents provided the requested data and Commerce conducted the recommended analysis, using appropriate log prices as benchmarks. In other instances, however, despite repeated requests by Commerce, Canada failed to provide the necessary data. Lacking sufficient data, Commerce was not able to conduct its analysis for all of the log sales for which Canada requested such an analysis.³¹

34. Second, Commerce properly investigated and made a determination concerning whether particular sales were at “arm’s length.” Contrary to Canada’s arguments,³² nothing in the SCM Agreement, the GATT 1994, or the DSB’s recommendations and rulings supports Canada’s argument that an arm’s-length analysis should be restricted to, in essence, a *per se* test based on affiliation alone. Further, part of the DSB’s recommendations and rulings related only to a particular category of arm’s-length log sales: those between tenured harvester/sawmills and unrelated, non-tenured sawmills.³³ The scope of the DSB’s recommendations and rulings should therefore not be broadened to include entities that were not part of those recommendations and rulings.

35. Finally, the results of Commerce’s recalculation were applied to the only rate that was before the original panel and Appellate Body, *i.e.*, the 18.79 percent *ad valorem* rate calculated in the Final Determination. Therefore, Canada’s argument that Commerce applied the results of its pass-through analysis to a rate “which long before had been invalidated as a result of judicial review proceedings”³⁴ is without basis.

³⁰ Section 129 Determination, at 1. Exhibit CDA-5.

³¹ *E.g.*, Section 129 Determination, at 3 and 13 (comment 8).

³² *E.g.*, First Written Submission of Canada, paras. 59 -65.

³³ *E.g.*, Appellate Body Report, para. 167(e).

³⁴ First Written Submission of Canada, para. 10.

VII. Conclusion

36. For the reasons stated above, Canada's claims against U.S. implementation of the DSB's recommendations and rulings have no basis in the SCM Agreement, the GATT 1994, or the recommendations and rulings of the DSB. The United States therefore requests that the Panel find that the United States properly implemented the recommendations and rulings of the DSB and that the Panel reject Canada's claims in their entirety. Further, the United States requests that this Panel find that the results of the first assessment review fall outside the Panel's jurisdiction in this Article 21.5 dispute.