

**UNITED STATES – INVESTIGATION OF THE INTERNATIONAL
TRADE COMMISSION IN SOFTWOOD LUMBER FROM CANADA**

Recourse to Article 21.5 of the DSU by Canada

Request for the Establishment of a Panel

The following communication, dated 14 February 2005, from the delegation of Canada to the Chairperson of the Dispute Settlement Body, is circulated pursuant to Article 21.5 of the DSU.

On 26 April 2004, the Dispute Settlement Body ("DSB") adopted the Panel report in *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada*.¹ The Panel found that the US International Trade Commission's ("USITC") threat of injury determination in *Softwood Lumber from Canada*², was not consistent with the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement") and the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"). The Panel recommended that the DSB request the United States to bring its measures into conformity with its obligations under both the *AD Agreement* and the *SCM Agreement*.

Specifically, the Panel concluded that the USITC's finding of a likely imminent substantial increase in softwood lumber imports from Canada was not one which could have been reached by an objective and unbiased investigating authority in light of the totality of the factors and the reasoning in the USITC determination.³ On this basis, the Panel concluded that the USITC determination was not consistent with the requirements of Article 3.7 of the *AD Agreement* and Article 15.7 of the *SCM Agreement*.⁴

The Panel also concluded that the USITC's determination was not consistent with the requirements of Article 3.5 of the *AD Agreement* and Article 15.5 of the *SCM Agreement* because the USITC's analysis rested upon its unsubstantiated finding of an imminent substantial increase in imports.⁵

Finally, the Panel found that in the absence of a WTO-consistent causation finding, it was not necessary or appropriate to make findings with respect to whether the ITC attributed the injuries

¹ Dispute Settlement Body, *Minutes of Meeting* (26 April 2004), WT/DSB/M/168, 2 June 2004, at para. 5. Also See *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada*, Report of the Panel, WT/DS277/R, adopted 26 April 2004 [hereinafter "Panel Report"].

² *Softwood Lumber from Canada*, Investigations Nos. 701-TA-414 and 731-TA-928 (Final), Publication 3509, May 2002.

³ Panel Report, at paras. 7.89, 7.96 and 8.1(a).

⁴ *Ibid.*

⁵ *Ibid.*, at paras. 7.122 and 8.2(a).

caused by other factors to the allegedly dumped and subsidized imports. In view of the fundamental significance of the non-attribution requirement and to give guidance should the issue arise in implementation, however, the Panel set out its serious concerns on this issue. The Panel concluded that given the overall absence of discussion of other factors potentially causing injury in the future, the Panel would conclude that the ITC determination is not consistent with the obligation in Article 3.5 of the *AD Agreement* and Article 15.5 of the *SCM Agreement* that "injuries caused by these other factors must not be attributed" to the allegedly dumped and subsidized imports.⁶

On 1 October 2004, pursuant to Article 21.3(b) of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), Canada and the United States agreed on a "reasonable period of time" for the United States to comply with the recommendations and rulings of the DSB.⁷ The United States undertook to bring its measure into conformity with the findings of the Panel no later than 26 January 2005.

After the adoption of the Panel report, the United States commenced implementation proceedings pursuant to its domestic law, specifically section 129(a) of the *Uruguay Round Agreements Act* ("URAA").⁸ On 24 November 2004, the USITC issued an unpublished determination⁹ pursuant to section 129(a)(4) that purported to comply with the DSB's recommendations and rulings ("the section 129 determination"). The USITC again reached the unsubstantiated conclusion that the US softwood lumber industry was threatened with material injury by reason of imports of softwood lumber from Canada alleged to be subsidized and sold in the United States at less than fair value (*i.e.*, dumped).¹⁰ One of the 6 Commissioners issued a detailed dissenting opinion in which he found that the evidence before the USITC did not support a finding that the US domestic industry producing softwood lumber was materially injured or threatened with material injury by reason of the allegedly dumped and subsidized imports from Canada.¹¹

On 10 December 2004, the US Trade Representative instructed the US Department of Commerce ("Commerce") to implement the section 129 determination by amending the anti-dumping and countervailing duty orders on softwood lumber products from Canada. On 20 December 2004, Commerce published a notice purporting to amend the anti-dumping and countervailing duty orders on softwood lumber products from Canada to reflect the section 129 determination.¹² At the DSB meeting of 25 January 2005, the United States informed the DSB that it had complied with its recommendations and rulings.

Canada considers that the United States has failed to implement the DSB's recommendations and rulings by:

- failing to make a determination of threat of material injury based on facts rather than on allegation, conjecture and remote possibility, as required by Article 3.7 of the *AD Agreement* and 15.7 of the *SCM Agreement*. In particular, the findings of the USITC that allegedly dumped and subsidized imports were likely to increase imminently and substantially and have a significant depressing or suppressing effect on domestic prices are not findings that could

⁶ Panel Report, at para. 7.137.

⁷ *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada, Agreement under Article 21.3 (b) of the DSU*, WT/DS277/7, 4 October 2004.

⁸ *Tariff Act of 1930*, Subtitle IV – Countervailing and Antidumping Duties, 19 U.S.C. 3538 (2000) (also referred to as Subtitle A of Title VII of the *Tariff Act of 1930*).

⁹ *Softwood Lumber from Canada*, Investigations Nos. 701-TA-414 and 731-TA-928, unpublished determination, 24 November 2004 [hereinafter "Section 129 Consistency Determination"].

¹⁰ Section 129 Consistency Determination, page 85.

¹¹ *Ibid.*, page 101.

¹² 69 Fed. Reg. 75,917 (Dep't Commerce 20 December 2004).

have been reached by an objective and unbiased investigating authority in light of the totality of the evidence considered and the reasoning in the section 129 determination.

- failing to demonstrate a causal relationship between the allegedly dumped and subsidized imports of Canadian softwood lumber and the threatened injury to the domestic industry, as required by Article 3.5 of the *AD Agreement* and Article 15.5 of the *SCM Agreement*;
- failing to examine in an unbiased and objective manner any and all known factors other than the allegedly dumped imports and allegedly subsidized imports of Canadian softwood lumber that were injuring or threatening to injure the domestic industry based on the record before the USITC, and further failing to ensure that the injuries that could be caused by these factors in the future were not attributed to the allegedly dumped and subsidized imports of Canadian softwood lumber, as required by Article 3.5 of the *AD Agreement* and Article 15.5 of the *SCM Agreement*.

Because the final definitive anti-dumping and countervailing duty orders dated 22 May 2002¹³ remain in effect pursuant to an invalid threat of injury determination, Canada considers that the United States has not taken measures to comply with the DSB's recommendations and rulings. Canada considers that the following measures, allegedly taken by the United States to comply with the DSB's recommendations and rulings, are inconsistent with the United States' obligations under Articles 3.5 and 3.7 of the *AD Agreement* and Articles 15.5 and 15.7 of the *SCM Agreement*:

- Section 129 Consistency Determination, Softwood Lumber from Canada, (24 Nov. 2004), Inv. Nos. 701-TA-414 and 731-TA-928;
- Notice of Amendment to Antidumping and Countervailing Duty Orders on Certain Softwood Lumber Products from Canada (20 Dec. 2004),¹⁴ and the 22 May 2002 orders, as purportedly amended by this notice.

Accordingly, as there is a disagreement with respect to the existence or consistency with covered agreements of the measures taken to comply with the DSB's recommendations and rulings, Canada seeks recourse to Article 21.5 of the DSU in this matter. Therefore, Canada requests that a special meeting of the DSB be held on 25 February 2005 to consider the following agenda item:

United States – Investigation of the International Trade Commission in Softwood Lumber from Canada;

Recourse by Canada to Article 21.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes.

Canada requests that the DSB refer the matter to the original panel, if possible, pursuant to Article 21.5 of the DSU.

¹³ 67 Fed. Reg. 36,067 and 67 Fed. Reg. 36,070 (Dep't Commerce 22 May 2002).

¹⁴ 69 Fed. Reg. 75,917 (Dep't Commerce 20 December 2004).