

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

Recourse to Article 21.5 of the DSU by Canada

Notification of an Appeal by Canada
under Article 16.4 and Article 17 of the Understanding on Rules
and Procedures Governing the Settlement of Disputes (DSU),
and under Rule 20(1) of the Working Procedures for Appellate Review

The following notification, dated 13 January 2006, from the Delegation of Canada, is being circulated to Members.

Pursuant to paragraph 4 of Article 16 of the *Understanding and Rules and Procedures Governing the Settlement of Disputes* (the "DSU") and Rule 20 of the Working Procedures for Appellate Review, Canada hereby notifies its decision to appeal certain issues of law and certain legal interpretations covered in the Panel Report on *United States – Investigation of the International Trade Commission In Softwood Lumber From Canada: Recourse to Article 21.5 of the DSU by Canada* (WT/DS/277/RW dated 15 November 2005).

Canada seeks review by the Appellate Body of the Panel's conclusion that the United States implemented the rulings and recommendations of the Dispute Settlement Body¹ and the Panel's findings that the November 24, 2004 threat of injury determination by the U.S. International Trade Commission (USITC) was not inconsistent with Articles 15.5 and 15.7 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement")² and Articles 3.5 and 3.7 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement").³ The Panel has erred in law and in its legal interpretations of the applicable provisions of the covered agreements. Canada therefore seeks review of the following:

1. The Panel's failure to carry out its duty under Article 11 of the DSU to make an objective assessment of the matter before it, by:
 - (a) failing to assess the applicability of the relevant covered agreements to the USITC's determination and failing to assess the conformity of the determination with those agreements, and, more specifically, by failing to apply the specific provisions of Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement to the

¹*United States – Investigation of the International Trade Commission in Softwood Lumber from Canada*, Recourse by Canada to Article 21.5 (DS257), Report of the Panel, WT/DS277/RW, circulated November 15, 2005, para. 8.2.

²*Ibid.*, paras. 7.57 and 8.1.

³*Ibid.*, paras. 7.74 and 8.1.

findings and conclusions in the USITC determination, and as a result, failing to examine whether those findings and conclusions were in conformity with those provisions;⁴

- (b) declining to examine the USITC's determination in light of the adopted findings of the original panel in this dispute⁵;
- (c) failing to make an objective assessment of the facts of the case by not conducting a detailed and searching analysis of the USITC's findings that:
 - (i) there was a clearly foreseen and imminent change in circumstances that would threaten injury to the domestic industry in the absence of protective measures⁶; and
 - (ii) there was a causal link between the subject imports and a threat of material injury to the domestic industry and that it was not required to conduct a non-attribution analysis⁷.

2. The Panel's failure to carry out its duties under Article 12.7 of the DSU to set out the applicability of relevant provisions and provide a "basic rationale" for its findings.⁸

3. The Panel's errors in finding that the USITC determination was not inconsistent with Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement, and in particular, its failure to apply the requirements of those provisions that:

- (a) a threat of material injury determination must be based on a clearly foreseen and imminent change in circumstances which would create a situation in which the dumping or subsidy would cause injury and must be based on facts and not merely on allegation, conjecture or remote possibility; and
- (b) the totality of the factors considered must lead to the conclusion that further dumped or subsidized exports are imminent and, unless protective action is taken, material injury would occur.⁹

4. The Panel's errors in finding that the USITC's conclusion that subject imports were entering the United States at prices likely to have adverse price effects is not inconsistent with Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement, despite the USITC's failure to conduct a comparison of import and domestic prices as required by those provisions.¹⁰

5. The Panel's errors in finding the USITC's conclusion that the volume of subject imports would increase substantially in the imminent future is not inconsistent with Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement when this conclusion relied on two other

⁴*Ibid.*, paras. 7.19 – 7.22, 7.26-7.28, 7.35, 7.39, 7.42, 7.50-7.52, 7.55-7.57.

⁵*Ibid.*, paras. 7.12, 7.35, 7.39, 7.42.

⁶*Ibid.*, paras. 7.13, 7.35, 7.39, 7.42, 7.52.

⁷*Ibid.*, paras. 7.62-7.63.

⁸*Ibid.*, paras. 7.24-7.57.

⁹*Ibid.*, paras. 7.13, 7.19 -7.22, 7.26-7.28, 7.35, 7.39, 7.42, 7.50-7.52, 7.55-7.57, 7.62-7.63, 7.72-7.73).

¹⁰*Ibid.*, paras. 7.50-7.52.

conclusions that the DSB had already found, in the original proceeding, to be inconsistent with the United States' WTO obligations.¹¹

6. The Panel's errors in finding the USITC's determination not inconsistent with Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement despite the failure of the USITC to: (i) demonstrate "a causal relationship between the dumped or subsidized imports and the injury to the domestic industry"; (ii) examine "any known factors other than the dumped or subsidized imports which at the same time are injuring the domestic industry"; and (iii) properly attribute injuries caused by these other factors. In particular, the Panel erred by:

- (a) affirming the USITC's conclusion that there was a causal link between dumped and subsidized imports and future material injury to the domestic industry even though fundamental elements of the USITC's analysis were in error;¹²
- (b) affirming the USITC's decision not to conduct a non-attribution analysis based on its erroneous conclusion that there were no known "other causal factors" potentially threatening material injury to the U.S. industry;¹³
- (c) failing to require the USITC to separate and distinguish the threat of injury posed by other sources of supply in the marketplace, considered both individually and on a cumulative basis, from the alleged threat attributed to oversupply from Canadian imports alone.¹⁴

Canada respectfully requests that the Appellate Body reverse the findings and conclusions of the Panel and find that the United States has failed to implement the DSB's rulings and recommendations.

¹¹*Ibid.*, paras. 7.26-7.28, 7.35, 7.39, 7.42.

¹²*Ibid.*, paras. 7.62-7.63.

¹³*Ibid.*, paras. 7.71-7.74.

¹⁴*Ibid.*, paras. 7.71-7.73.