

**UNITED STATES – FINAL COUNTERVAILING DUTY DETERMINATION
WITH RESPECT TO CERTAIN 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 30 December 2004, from the delegation of Canada to the Chairperson of the Dispute Settlement Body, is circulated pursuant to Article 21.5 of the DSU.

On 17 February 2004, the Dispute Settlement Body (DSB) adopted the Panel and Appellate Body reports in *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*.¹ The Panel and Appellate Body found that the US Department of Commerce (Commerce) was required to conduct a "pass-through" analysis in respect of arm's length sales of logs by tenured harvesters/sawmills² and independent harvesters to unrelated sawmills pursuant to the *General Agreement on Tariffs and Trade, 1994* (GATT 1994) and the *Agreement on Subsidies and Countervailing Measures* (SCM Agreement).

On 28 April 2004, Canada and the United States reached an agreement on a "reasonable period of time" pursuant to Article 21.3(b) of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU).³ The United States confirmed in this agreement that it would complete implementation no later than 17 December 2004.

Shortly after adoption of the Panel and Appellate Body reports, the United States commenced implementation proceedings pursuant to section 129(b) of the *Uruguay Round Agreements Act* (URAA).⁴ On 6 December 2004, Commerce released a countervailing duty determination pursuant to section 129 that announced results of its purported "pass-through" analysis. On 10 December 2004, in accordance with an instruction of that date from the US Trade Representative to implement the determination, Commerce issued a notice of implementation of its section 129 determination, in

¹ Dispute Settlement Body, *Minutes of Meeting* (17 February and 19 March, 2004), WT/DSB/M/165, 30 March 2004, at para. 49. Also See *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, Report of the Appellate Body, WT/DS257/AB/R, adopted 17 February 2004 ["Appellate Body Report"]; and *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, Report of the Panel, WT/DS257/R, adopted 17 February 2004.

² The Appellate Body used the term "tenured harvester/sawmill" to refer to an enterprise holding a stumpage contract that fells trees and produces logs, and also processes logs into softwood lumber. See Appellate Body Report, at fn. 150.

³ *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, Agreement under Article 21.3(b) of the DSU, WT/DS257/13, 30 April 2004.

⁴ 19 U.S.C. § 3538(b).

which it announced that the countervailing duty cash deposit rate would be reduced, effective 10 December 2004, by 0.17 (*i.e.*, from 18.79 per cent to 18.62 per cent).⁵ On 20 December 2004, with the publication of the final results of the first administrative review of the countervailing duty order, Commerce established a definitive countervailing duty rate for the period of review and replaced the amended section 129 countervailing duty cash deposit rate with a new cash deposit rate without any "pass-through" analysis.⁶ At the DSB meeting of 17 December 2004, the United States informed the DSB that it had complied with its rulings and recommendations.

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

- limiting the category of transactions reviewed in the "pass-through" analysis to sales of logs by independent harvesters to unrelated sawmills, excluding transactions between harvesters/sawmills and unrelated sawmills, contrary to the DSB's recommendations and rulings;
- presuming, without an appropriate "pass-through" analysis, that certain transactions between independent harvesters and unrelated sawmills were not at arm's-length and that a "pass-through" of the alleged benefit occurred;
- applying the results of the "pass-through" analysis to a countervailing duty cash deposit rate invalidated as a result of judicial review proceedings conducted in accordance with US law, and failing to apply the results to a valid rate;⁷ and
- failing to conduct a "pass-through" analysis in the final results of the first administrative review.⁸

Canada considers that the following measures allegedly taken by the United States to comply with the DSB's recommendations and rulings were inconsistent with US obligations under Articles 10 and 32.1 of the *SCM Agreement* and Article VI:3 of the *GATT 1994*:

- *Notice of Implementation Under Section 129 of the Uruguay Round Agreements Act; Countervailing Measures Concerning Certain Softwood Lumber Products from Canada*,⁹ and *Section 129 Determination: Final Countervailing Duty Determination, Certain Softwood Lumber from Canada*,¹⁰

⁵ *Section 129 Determination: Final Countervailing Duty Determination, Certain Softwood Lumber from Canada*, 6 December 2004; *Notice of Implementation Under Section 129 of the Uruguay Round Agreements Act; Countervailing Measures Concerning Certain Softwood Lumber Products From Canada*, 69 Fed. Reg. 75,305 (Dep't Commerce 16 December 2004).

⁶ *Notice of Final Results of Countervailing Duty Administrative Review and Rescission of Certain Company-Specific Reviews: Certain Softwood Lumber Products from Canada*, 69 Fed. Reg. 75,917 (Dep't Commerce 20 December 2004); and *Issues and Decision Memorandum: Final Results of Administrative Review: Certain Softwood Lumber Products from Canada*, December 13, 2004.

⁷ *Section 129 Determination: Final Countervailing Duty Determination, Certain Softwood Lumber from Canada*, 6 December 2004, Comment 6, at 11.

⁸ See e.g., *Issues and Decision Memorandum: Final Results of Administrative Review: Certain Softwood Lumber Products from Canada*, 13 December 2004, at 43-48.

⁹ 69 Fed. Reg. 75,305 (Dep't Commerce December 16, 2004)

¹⁰ 6 December 2004.

- *Notice of Amended Final Affirmative Countervailing Duty Determination and Notice of Countervailing Duty Order: Certain Softwood Lumber Products from Canada;*¹¹ and
- *Notice of Final Results of Countervailing Duty Administrative Review and Rescission of Certain Company-Specific Reviews: Certain Softwood Lumber Products from Canada,*¹² and *Issues and Decision Memorandum: Final Results of Administrative Review: Certain Softwood Lumber Products from Canada.*¹³

Accordingly, as there is a disagreement as to the existence or consistency with a covered agreement of the measures taken to comply with the rulings and recommendations of the DSB, Canada seeks recourse to Article 21.5 of the DSU in this matter. Accordingly, Canada requests that a special meeting of the DSB be held on 14 January 2005 to consider the following agenda item:

United States – Final Countervailing Duty Determination with Respect to Certain 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.

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

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

¹³ 13 December 2004.