

**UNITED STATES – PRELIMINARY DETERMINATIONS  
 WITH RESPECT TO CERTAIN SOFTWOOD LUMBER  
 FROM CANADA**

**Report of the Panel**  
 WT/DS236/R

*Adopted by the Dispute Settlement Body  
 on 1 November 2002*

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## I. INTRODUCTION

A. *Complaint of Canada*

1.1 On 21 August 2001, Canada requested consultations with the United States pursuant to Article 4 of the Dispute Settlement Understanding ("the DSU"), Article XXII of the General Agreement on Tariffs and Trade 1994 ("GATT 1994") and Article 30 of the Agreement on Subsidies and Countervailing Measures ("the *SCM Agreement*" or "the Agreement"), with regard to the preliminary countervailing duty determination and the preliminary critical circumstances determination made by the US Department of Commerce ("USDOC") on 9 August 2001, with respect to certain softwood lumber from Canada, and with regard to US measures on company-specific expedited reviews and administrative reviews.<sup>1</sup>

1.2 On 17 September 2001, Canada and the United States held the requested consultations, but failed to reach a mutually satisfactory resolution of the matter.

1.3 On 25 October 2001, Canada requested the establishment of a panel to examine the matter.<sup>2</sup>

B. *Establishment and Composition of the Panel*

1.4 At its meeting of 5 December 2001, the Dispute Settlement Body ("the DSB") established a Panel in accordance with Article 6 of the DSU and pursuant to the request made by Canada in document WT/DS236/2.

1.5 At that meeting, the parties to the dispute also agreed that the Panel should have standard terms of reference. The terms of reference therefore are the following:

"To examine, in the light of the relevant provisions of the covered agreements cited by Canada in document WT/DS236/2 the matter referred to the DSB by Canada in that document, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."

<sup>1</sup> WT/DS/236/1.

<sup>2</sup> WT/DS/236/2.

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1.6 On 22 January 2002, Canada requested the Director-General to determine the composition of the Panel, pursuant to paragraph 7 of Article 8 of the DSU. This paragraph provides:

"If there is no agreement on the panelists within 20 days after the date of the establishment of a panel, at the request of either party, the Director-General, in consultation with the Chairman of the DSB and the Chairman of the relevant Council or Committee, shall determine the composition of the panel by appointing the panelists whom the Director-General considers most appropriate in accordance with any relevant special or additional rules or procedures of the covered agreement or covered agreements which are at issue in the dispute, after consulting with the parties to the dispute. The Chairman of the DSB shall inform the Members of the composition of the panel thus formed no later than 10 days after the date the Chairman receives such a request."

1.7 On 1 February 2002, the Director-General accordingly composed the Panel as follows:

Chairman: Mr. Dariusz Rosati

Members: Mr. Robert Arnott

Mr. Gonzalo Biggs

The European Communities, India and Japan reserved their third party rights.

*C. Panel Proceedings*

1.8 The Panel met with the parties on 24-25 April 2002 and 4 June 2002. The Panel met with third parties on 24 April 2002.

1.9 On 26 July 2002, the Panel provided its interim report to the parties.

**II. FACTUAL ASPECTS**

2.1 This dispute concerns the preliminary countervailing duty determination and the preliminary critical circumstances determination made by the USDOC on 9 August 2001 in respect of certain softwood lumber imports from Canada, classified under headings 4407.1000, 4409.1010, 4409.1020, and 4409.1090.<sup>3</sup> This dispute also concerns US law on expedited and administrative reviews in the context of countervailing measures.

2.2 On 2 April 2001 an application for countervailing duties was filed with the USDOC by the Coalition for Fair Lumber Imports Executive Committee; the United Brotherhood of Carpenters and Joiners; and the Paper, Allied-Industrial, Chemical and Energy Workers International Union. On 20 April 2001, the application was amended to include as applicants Moose River Lumber Co., Inc.; Shearer Lumber Products; Shuqualak Lumber Co.; and Tolleson Lumber Co., Inc. On 30 April 2001, the USDOC published a notice of initiation of a countervailing duty investigation in the US Federal Register.

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<sup>3</sup> The countervailing duty investigation concerned in this dispute is sometimes referred to as the "Lumber IV" investigation.



2.3 In May 2001, the US International Trade Commission ("ITC") published its preliminary affirmative determination that there was a reasonable indication that the US industry was threatened with material injury by reason of imports from Canada of softwood lumber, which were alleged to be subsidized by the Government of Canada.

2.4 On 27 July 2001, the USDOC amended the initiation of the investigation, to exempt from investigation imports of certain softwood lumber produced in the Maritime Provinces from timber harvested in the Maritime Provinces.<sup>4</sup>

2.5 On 17 August 2001, the USDOC published in the Federal Register a notice of preliminary affirmative countervailing duty determination, preliminary affirmative critical circumstances determination, and alignment of final countervailing duty determination with final antidumping duty determination. Provisional measures (withholding of appraisement and posting of cash deposit or bond) were imposed on the basis of a preliminary subsidy rate of 19.31 per cent, applicable to all producers/exporters, and applied to all entries of the subject merchandise from Canada entered, or withdrawn from warehouse, for consumption on or after 90 days prior to the date of publication of the notice.

### III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

#### A. Canada

3.1 Canada requests the Panel to:

- find that the Preliminary Countervailing Duty Determination of the United States in the softwood lumber case violates Articles 10, 14, 17.1, 17.2, 17.5, 19.4 and 32.1 of the *SCM Agreement* and Article VI:3 of GATT 1994;
- find that the Preliminary Critical Circumstances Determination of the United States in the softwood lumber case violates Article 17.1(b), 17.3, 17.4, 17.5, 19.4 and 20.6 of the *SCM Agreement* and Article VI:3 of GATT 1994;
- find that US countervailing duty law regarding expedited and administrative reviews and the application of that law in the *Lumber IV* investigation violate Articles 10, 19.3, 19.4, 21.2 and 32.1 of the *SCM Agreement* and that as a result, the United States has failed to ensure that its laws, regulations and administrative procedures are in conformity with its WTO obligations as required by Article XVI:4 of the WTO Agreement and Article 32.5 of the *SCM Agreement*; and
- recommend that the United States bring its measures into conformity with the *SCM Agreement* and the WTO Agreement, including by lifting the suspension of liquidation for the period of 19 May through 16 August 2001, and making company-specific expedited and administrative reviews available to exporters and producers subject to any coun-

<sup>4</sup> US Department of Commerce, *Notice of preliminary affirmative countervailing duty determination, preliminary affirmative critical circumstances determination, and alignment of final countervailing duty determination with final antidumping duty determination: Certain softwood lumber products from Canada*, Exhibit CDA-1, p. 43,188.

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tervailing duty order that may be issued as a result of the *Lumber IV* investigation.

*B. United States*

3.2 The United States requests that the Panel reject Canada's claims in their entirety.

**IV. ARGUMENTS OF THE PARTIES**

4.1 The arguments of the parties are set forth in their written and oral submissions to the Panel, and in their answers to questions. The parties' arguments as presented in their submissions are summarized in this section. Summaries of the parties' written answers to questions are set forth in the Annexes to this report (*see* list of annexes at page ).

*A. First Written Submission of Canada*

4.2 The following are Canada's arguments in its first written submission.

4.3 At issue in this dispute are the preliminary countervailing duty determination (the "preliminary determination") and the preliminary critical circumstances determination made by the USDOC on 9 August 2001, with respect to certain softwood lumber from Canada, which violate US obligations under the *SCM Agreement* and GATT 1994. Also at issue is the denial of company-specific expedited reviews and administrative reviews under US countervailing duty law, which violates US obligations under the *SCM Agreement* and the WTO Agreement.

*1. The Preliminary Countervailing Duty Determination*

4.4 In the preliminary countervailing duty determination, the USDOC concluded that "provincial stumpage programmes" in Quebec, British Columbia, Ontario, Alberta, Manitoba and Saskatchewan are countervailable subsidies. It determined (a) that stumpage is the "provision of a good or service", (b) based on a "cross-border" analysis of "benefit", that the stumpage programmes were subsidies to softwood lumber producers, and (c) that the alleged subsidies were specific. It assumed that the benefit was passed through to certain producers. Of the 19.31 per cent country-wide subsidy rate calculated by the USDOC, a full 19.21 per cent is attributed to these "stumpage programmes".

4.5 The USDOC's findings and determinations and the provisional measures imposed as a result are inconsistent with US obligations under the *SCM Agreement* and GATT 1994. Specifically: (a) the Canadian practices in question are not "subsidies" as defined in Article 1 of the *SCM Agreement*, (b) the USDOC impermissibly inflated the alleged subsidy rate by calculating a country-wide rate based on only a portion of Canadian production and exports of softwood lumber; and (c) the USDOC impermissibly inflated the provisional measures imposed by applying them on an entered value after having calculated the subsidy rate using a first mill value. Al-