

***United States – Final Countervailing Duty Determination with
Respect to Certain Softwood Lumber from Canada:
Recourse to Article 21.5 of the DSU by Canada***

(AB-2005-8)

**ADDITIONAL MEMORANDUM
OF THE UNITED STATES OF AMERICA**

October 5, 2005

BEFORE THE
WORLD TRADE ORGANIZATION
APPELLATE BODY

*United States – Final Countervailing Duty Determination with
Respect to Certain Softwood Lumber from Canada:
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SERVICE LIST

OTHER PARTICIPANT

H.E. Mr. Don Stephenson, Permanent Mission of Canada

THIRD PARTICIPANTS

H.E. Mr. Sun Zhenyu, Permanent Mission of China

H.E. Mr. Carlo Trojan, Permanent Delegation of the European Commission

Additional Memorandum of the United States

1. On September 26, 2005, the Appellate Body requested that the United States expand its explanations regarding: (i) the relationship between original final countervailing duty determinations and subsequent assessment reviews; and (ii) the relationship between determinations under Section 129 of the Uruguay Round Agreements Act (“Section 129”) and countervailing duty proceedings under United States law more generally.

The Appellate Body requested that the United States refer to relevant statutory and/or regulatory provisions and cautioned the Parties that they were to refrain from making additional arguments regarding the issue on appeal, or from filing new evidentiary material.¹ Mindful of these instructions from the Appellate Body, the United States expands its explanations as follows.

(i) The Relationship Between Original Final Countervailing Duty Determinations and Subsequent Assessment Reviews

2. United States law distinguishes between final countervailing duty determinations, which result from countervailing duty investigations,² and subsequent assessment reviews (“administrative reviews” in U.S. parlance), which are conducted, if requested, on an annual basis after the countervailing duties are imposed by means of a countervailing duty order.³ Significantly, the former is the mechanism by which countervailing duties are imposed – after affirmative findings of both subsidization and injury; and the latter is the mechanism by which duties subsequently are assessed – after calculation of the rate of subsidization for entries during the period of review. In addition to recognizing the different purposes served by final determinations and assessment reviews, the statute and the implementing regulations define the different parameters of investigation determinations and assessment reviews, including identifying the discrete time periods that are examined and the import entries that are affected by each.

¹ As requested by the Appellate Body, in this memorandum, the United States refers to relevant statutory and regulatory provisions. The United States provided information to the Article 21.5 Panel on the relationship among investigations, assessment reviews, and Section 129 determinations. The explanations in this memorandum provide more details on that relationship; for instance, with the exception of portions of 19 U.S.C. § 1675(a) (Exhibit US-2), and 19 U.S.C. § 3538 (Exhibit CDA-2), the statutory and regulatory provisions were not exhibits before the Article 21.5 Panel. Additionally, portions of the Statement of Administrative Action were included as Exhibit CDA-1.

² The statutory provisions governing the imposition of countervailing duties are contained in 19 U.S.C. §§ 1671, 1671a-1671g.

³ 19 U.S.C. § 1675(a)(1). Exhibit US-2.

3. In the course of conducting its investigation, the United States countervailing duty statute directs the U.S. Department of Commerce (“Commerce”) to issue a preliminary determination.⁴ If affirmative, the preliminary determination establishes an *estimated* countervailing duty rate.⁵ In those instances, the statute directs Commerce to order the posting of a cash deposit or other security and to order the suspension of liquidation of entries entered, or withdrawn from warehouse, for consumption on or after the date of publication of the notice of preliminary determination.⁶ “Suspension of liquidation of entries”, in U.S. parlance, means that the final assessment of duties on the imports is suspended pending some final action with respect to those entries.

4. If the final determination of the countervailing duty investigation is affirmative, the statute directs Commerce to determine either an *estimated* individual countervailing duty rate for each exporter or producer individually investigated or, if an aggregate investigation has been conducted, a single *estimated* country-wide subsidy rate applicable to all exporters and producers.⁷ In both instances, Commerce orders the posting of a cash deposit, bond or other security in an amount based upon the *estimated* countervailing duty rate.⁸ If the U.S. International Trade Commission (“ITC”) subsequently issues a final affirmative finding of injury or threat of injury, Commerce is directed to issue a countervailing duty order, and a countervailing duty is imposed.⁹ At that point, for imports on or after the date of the order, entries are subject to the payment of a cash deposit to secure the possible assessment of countervailing duties. The statute thus requires that upon an affirmative final determination by Commerce and an affirmative ITC injury or threat of injury determination “there shall be *imposed* upon such merchandise a countervailing duty . . . equal to the net countervailable subsidy.”¹⁰

5. The U.S. countervailing duty statute does not identify the precise period for which information is examined during a countervailing duty investigation (the “period of investigation” in U.S. parlance). Commerce’s regulations, however, provide that, with respect to countervailing duty investigations, the period of investigation normally will be the most recently

⁴ Commerce conducts its investigation of subsidies only if the U.S. International Trade Commission has made a preliminary determination of injury or threat of injury.

⁵ 19 U.S.C. § 1671b(b).

⁶ 19 U.S.C. § 1671b(d)(1)(A) & (B).

⁷ 19 U.S.C. § 1671d(c)(B)(i)(I) & (II).

⁸ 19 U.S.C. § 1671d(B)(ii).

⁹ 19 U.S.C. § 1671d(c)(2).

¹⁰ 19 U.S.C. § 1671(a) (1) & (2) (emphasis added).

completed fiscal year of the government and exporters or producers in question.¹¹ If the fiscal years of the individual exporters or producers differ, Commerce normally will examine the most recently completed calendar year. If the investigation is conducted on an aggregate basis, however, Commerce normally will rely upon information relating to the most recently completed fiscal year for the government.¹² Thus, under U.S. law, the period examined in a countervailing duty investigation is a discrete, identifiable period of time. The period of investigation examined by Commerce in its aggregate countervailing duty investigation of softwood lumber from Canada was Canada’s most recently completed fiscal year, April 1, 2000 through March 31, 2001.

6. Assessment reviews are governed by a separate section of the statute, 19 U.S.C. § 1675, and by different sections of Commerce’s regulations. The statute specifically provides that at least once during each 12-month period beginning on the anniversary date of the publication of the countervailing duty order, upon proper request and publication of notice, Commerce shall review and determine the amount of any net countervailable subsidy bestowed during the period of review.¹³ The statute expressly provides that “[t]he determination under this paragraph shall be the basis for the *assessment* of countervailing or antidumping duties on entries of merchandise covered by the determination and for deposits of estimated duties.”¹⁴

7. As a consequence of the retrospective nature of the U.S. assessment system, the assessment review is the mechanism pursuant to which “*final liability* for anti-dumping and countervailing duties is determined after merchandise is imported.”¹⁵ Commerce’s regulations identify the appropriate period of review for a countervailing duty assessment review, *i.e.*, the specific entries of imported subject merchandise covered by the assessment review. Specifically, 19 C.F.R. § 351.213(e)(2) provides that the period of review will normally cover entries during the most recently completed calendar year. If the review is conducted on an aggregate basis, however, the period of review normally will cover the most recently completed fiscal year of the responding government.¹⁶ For assessment reviews for which requests are received in the first anniversary month after publication of an order, entries covered by the review include only those entries from the date of suspension of liquidation through the most recently completed calendar or fiscal year, as the case may be. Consistent with the regulation, the period of review for which

¹¹ 19 C.F.R. § 351.204(b)(2).

¹² 19 C.F.R. § 351.204(b)(2).

¹³ 19 U.S.C. § 1675(a)(1). Exhibit US-2.

¹⁴ 19 U.S.C. § 1675(a)(2)(C)(emphasis added).

¹⁵ 19 C.F.R. § 351.213(a). If no request for assessment review is made, entries are assessed at the entered rate, *i.e.*, the cash deposit rate. 19 C.F.R. § 351.212(c).

¹⁶ 19 C.F.R. § 351.213(e)(2).

information was examined during the First Assessment Review for certain softwood lumber was the government of Canada's fiscal year, April 1, 2002 through March 31, 2003.¹⁷ As a consequence of the ITC's threat of injury determination and the issuance of the order on May 22, 2002, the First Assessment Review established an assessment rate for entries between May 22, 2002 and March 31, 2003, and established a cash deposit rate for entries made after December 20, 2004, a cash deposit rate that remains in effect until such time as final results of the second assessment review are issued.

8. Commerce is not precluded from examining any relevant information when conducting an investigation or review so long as that information is on the administrative record of that particular investigation or review. Such information is either supplied by interested parties or collected by Commerce. Under U.S. law and Commerce regulations, the investigation and each individual review by Commerce have separate and distinct administrative records, which are separately reviewable by domestic courts.¹⁸ A Section 129 determination also has a separate and distinct administrative record, which is separately reviewable by domestic courts.

9. An issue treated in one fashion in an investigation may warrant different treatment in a subsequent assessment review for two reasons. First, relevant facts on the administrative record of the investigation may differ from relevant facts on the administrative record of the assessment review. Second, the law might provide for different treatment of an issue in an investigation versus in an assessment review. For example, under U.S. law, the *de minimis* standard in a countervailing duty investigation is 1 percent, whereas the *de minimis* standard in an assessment review is 0.5 percent.¹⁹ A party that receives a *de minimis* rate during the investigation will be excluded from the order, whereas a party that receives a *de minimis* rate during an assessment review will have no duties assessed on its entries of subject merchandise during the period of review, but remains subject to the order.

¹⁷ The United States notes in this regard a minor mistake in the dates in footnote 34 of its Appellant Submission. The entries subject to assessment as a consequence of the First Assessment Review are those entered between May 22, 2002 and March 31, 2003; however, information was examined for the entire fiscal year, *i.e.*, April 1, 2002 through March 31, 2003.

¹⁸ 19 C.F.R. § 351.102(b) (defining "segment of proceeding").

¹⁹ Compare 19 U.S.C. § 1671b(b)(4)(A) (investigation) with 19 C.F.R. § 351.106(c)(1) (reviews). The distinction between investigations and reviews and treatment of the same issue differently in investigations and reviews has been recognized by the Appellate Body. *See, e.g.*, Appellate Body Report, *United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany*, WT/DS213/AB/R and Corr.1, adopted 19 December 2002, paras. 67-68, 72, 83, 85-87, 91-97.

(ii) *The Relationship Between Determinations Under Section 129 and Countervailing Duty Proceedings Under U.S. Law More Generally*

10. In contrast to countervailing duty investigations and assessment reviews, which result in the imposition and assessment of countervailing duties, respectively, Section 129 is a U.S. statutory provision which sets forth the requirements for implementation of certain DSB recommendations and rulings involving an action by Commerce in an antidumping or countervailing duty proceeding.²⁰ Broadly speaking, Section 129 sets forth four stages in implementing such DSB recommendations and rulings. First, the Office of the United States Trade Representative (“USTR”) consults with Commerce and committees in the U.S. Congress with jurisdiction over trade matters.²¹ Commerce then commences the steps necessary to make a determination that would render Commerce’s actions not inconsistent with the findings of the panel or the Appellate Body. Second, USTR formally requests Commerce to issue that determination.²² Once this request is made, the statute provides a further 180 days for Commerce to issue the determination.²³ In making its determination, Commerce is required to “provide interested parties with an opportunity to submit written comments and, in appropriate cases, may hold a hearing, with respect to the determination.”²⁴ Third, after Commerce issues its new determination, USTR again consults with Commerce and with trade committees in the U.S. Congress.²⁵ Based on those consultations, USTR may then direct Commerce to implement its new determination.²⁶ Finally, Commerce notifies the public of the implementation of the new determination through publication in the Federal Register.²⁷

²⁰ 19 U.S.C. § 3538(b)(2). Exhibit CDA-2.

²¹ 19 U.S.C. § 3538(b)(1). Exhibit CDA-2. As explained in the SAA, “The requirement for the Trade Representative to consult with Commerce is intended to ensure that the Trade Representative benefits from Commerce’s administrative and substantive expertise in evaluation of a panel’s findings and the development of implementing actions, if any.” Statement of Administrative Action accompanying transmittal of Uruguay Round Agreements implementing bill, H.Doc. 103-316, Vol. 1 (27 September 1994), p. 356. Exhibit CDA-1, at 1025.

²² 19 U.S. C. § 3538(b)(2). Exhibit CDA-2.

²³ 19 U.S.C. § 3538(b)(2). Exhibit CDA-2. Under Section 129(b)(2), the 180-day period begins when USTR transmits a formal request to Commerce.

²⁴ 19 U.S.C. § 3538(d). Exhibit CDA-2.

²⁵ 19 U.S.C. § 3538(b)(3). Exhibit CDA-2.

²⁶ 19 U.S.C. § 3538(b)(4). Exhibit CDA-2.

²⁷ 19 U.S.C. § 3538(c)(2)(A). Exhibit CDA-2.

11. The statute does not limit the information Commerce may consider when preparing a Section 129 determination.²⁸ In making decisions concerning information to be considered, Commerce is guided by the facts.

12. In this dispute, the DSB recommendations and rulings only related to Commerce's actions regarding pass-through in the countervailing duty investigation. In implementing the recommendations and rulings and revising its Final Countervailing Duty Determination in the Section 129 Determination, Commerce considered information related to the period of investigation covered by the Final Countervailing Duty Determination. The DSB recommendations and rulings did not encompass Commerce's actions in the First Assessment Review. However, in view of the original WTO findings, Commerce applied the same pass-through methodology in the First Assessment Review as it applied in the Section 129 Determination. Of course, in the First Assessment Review Commerce considered information related to the period of review (2002 - 2003) and not the period of investigation (2000 - 2001).

²⁸ 19 U.S.C. § 3538(c). Exhibit CDA-2.