

GENERAL AGREEMENT ON

TARIFFS AND TRADE

RESTRICTED

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Committee on Subsidies and
Countervailing Measures

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UNITED STATES - MEASURES AFFECTING IMPORTS OF SOFTWOOD LUMBER FROM CANADA

The attached letter, dated 7 December 1992, was received by the Chairman of the Committee from Mr. Michael Cartland, Chairman of the Panel in the dispute between Canada and the United States on measures taken by the United States in respect of softwood lumber from Canada. As requested by the Panel's Chairman, this letter is hereby circulated to the members of the Committee.

The Panel in the dispute between Canada and the United States on softwood lumber, which recently concluded its work, wishes to draw the attention of members of the Committee on Subsidies and Countervailing Measures to certain concerns which have arisen during the course of the Panel's proceedings. The Panel kindly requests you to ensure that, if no solution to the dispute is reached during the next several weeks, the Panel's observations below will be circulated to the Committee together with the full Panel report.

The Panel feels that a number of substantive concerns have been raised by the parties in this case. The Panel saw considerable merit in many of Canada's criticisms with respect to the United States' initiation of a countervailing duty investigation on imports of softwood lumber from Canada. In particular, the Panel recognized that the data and methodologies used by the United States contained shortcomings, in some cases of a serious nature. A number of questions arose regarding particular aspects of the evidence addressed by the US Department of Commerce. Moreover, certain facts available to the United States, for example on the impact of the recession, were, but arguably should not have been, ignored. Such information might have had an important bearing on this case, even at the initiation stage. However, the Panel had to take into account that it was not reviewing a determination of the existence of subsidy, injury and causality, but a finding that sufficient evidence of these elements existed to warrant an investigation. Moreover, in reviewing this matter, which necessarily involved a large range of issues of fact, the Panel had to take into account that the matter was not before it on a de novo basis. The Panel was also aware, despite its rigorous application of the criteria established in paragraphs 331, 332, 333 and 335 of its

report, of concerns that the threshold for initiation as applied in customary practice in several countries was relatively low. Nonetheless, the Panel was of the view that the threshold required by Article 2:1 of the Agreement for initiation of a countervailing duty investigation was such that the Panel could not properly find that the United States initiation in this case was inconsistent with that Article, having regard to the standard of review.

The Panel recognized that in addition to the question of the threshold of the initiation standard under Article 2:1, there could be legitimate concerns over the practicality of providing meaningful multilateral scrutiny of an initiation decision by a signatory. However, the Panel had to take into account that it is not the function of panels to propose changes to the provisions of GATT Agreements but to make findings regarding their interpretation and application.

Notwithstanding these considerations, the Panel stresses that the proper functioning of the Agreement requires a careful balance to be struck between the rights of signatories on the one hand and their obligations on the other. In this regard, the Panel wishes to draw attention to its view in paragraph 331 of its report that the initiation requirement in Article 2:1 of the Agreement reflects a balance between the interests of the import competing domestic industry in the importing country and the interests of the exporting country in avoiding the potentially burdensome consequences of a countervailing duty investigation initiated on an unmeritorious basis. In this respect, the Panel considers that in applying the appropriate standard to a review of the decision of a national authority to initiate a countervailing duty investigation, there is a need to be sensitive to the intended anti-harassment function of Article 2:1 of the Agreement.

The Panel hopes that the points addressed in this letter will assist in future efforts regarding the further development of disciplines on the initiation of investigations.

I remain, Mr. Chairman,

Yours Sincerely,

M.D. Cartland (signed)

Michael Cartland
Chairman
Panel on Softwood Lumber