

US – SOFTWOOD LUMBER IV¹ (DS257)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	Canada	ASCM Arts. 1.1(a)(1)(iii), 2, 10, 14(d) and 32 GATT Art. VI:3	Establishment of Panel	1 October 2002
			Circulation of Panel Report	29 August 2003
Respondent	United States		Circulation of AB Report	19 January 2004
			Adoption	17 February 2004

1. MEASURE AND PRODUCT AT ISSUE

- **Measure at issue:** US final countervailing duty determination.
- **Product at issue:** Certain softwood lumber imports from Canada.

2. SUMMARY OF KEY PANEL/AB FINDINGS²

- **ASCM Art. 1.1(a): (1): (iii) (definition of a subsidy – financial contribution):** The Appellate Body upheld the Panel's finding that the United States Department of Commerce's ("USDOC") "[d]etermination that the Canadian provinces were providing a financial contribution in the form of the provision of a good by providing standing timber to timber harvesters through the stumpage programmes" was not inconsistent with Art. 1.1(a)(1)(iii). It found that the ordinary meaning of "goods" should not be read so as to exclude tangible items of property, like trees, that are severable from land and also, that the way in which the municipal law of WTO Member classifies an item cannot in itself be determinative of the interpretation of provisions of the WTO covered agreements. The Appellate Body also upheld the Panel's finding that through the stumpage arrangements, the provincial governments "provide" such goods within the meaning of Art. 1.1(a)(1)(iii).
- **ASCM Art. 14(d) (benefit – calculation of amount of subsidy):** The Appellate Body reversed the Panel's finding and held that "an investigating authority may use a benchmark other than private prices in the country of provision, when it has been established that private prices of the goods in question in that country are distorted, because of the predominant role of the government in the market as a provider of the same or similar goods." It thus reversed the Panel's consequential findings that the United States acted inconsistently with Arts. 10, 14, 14(d) and 32.1 by imposing countervailing duties based on US stumpage prices rather than using the "prevailing market conditions" in Canada. However, it was unable to complete the legal analysis of whether the USDOC's determination of benefit was consistent with Art. 14(d).
- **GATT Art. VI:3/ASCM Arts. 10 and 32.1 (pass-through of benefit):** The Appellate Body concluded that "where countervailing duties are used to offset subsidies granted to producers of input products, while the duties are to be imposed on processed products, and where input producers and downstream processors operate at arm's length, the investigating authority must establish that the benefit conferred by a financial contribution directly on input producers is passed through, at least in part, to producers of the processed product subject to the investigation." Thus it upheld the Panel's finding that the USDOC's failure to conduct a pass-through analysis in respect of arm's-length sales of logs by timber harvesters who own sawmills to unrelated producers of softwood lumber was inconsistent with Arts. 10 and 32.1 and GATT Art. VI:3. However, it reversed the Panel's finding with respect to sales of lumber by sawmills to unrelated lumber manufacturers.

¹ *United States – Final Countervailing Duty Determination With Respect to Certain Softwood Lumber from Canada*

² Other issues addressed: ASCM Art. 2 (specificity); *amicus curiae* submission; Appellate Body's working procedures (Rule 24(1) – deadline for third participant's submission); terms of reference.

US – SOFTWOOD LUMBER IV (ARTICLE 21.5 – CANADA)¹ (DS257)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	Canada	ASCM Arts. 10 and 32 DSU Art. 19.1	Referred to the Original Panel	14 January 2005
			Circulation of Panel Report	1 August 2005
Respondent	United States		Circulation of AB Report	5 December 2005
			Adoption	20 December 2005

1. MEASURE TAKEN TO COMPLY WITH THE DSB RECOMMENDATIONS AND RULINGS

- United States Department of Commerce (“USDOC”) revised countervailing duty determination (i.e. “Section 129 determination”).² The “First Assessment Review”,³ including the pass-through analysis in the Review.

2. SUMMARY OF KEY PANEL/AB FINDINGS

- ASCM Arts. 10 and 32.1/GATT Art. VI:3 (pass-through):** The Panel found the United States failed to implement the DSB recommendations from the original proceedings and imposed countervailing duties inconsistently with ASCM Arts. 10 and 32.1 and GATT Art. VI:3, because the USDOC, in both the Section 129 Determination and the First Assessment Review, did not conduct a pass-through analysis in respect of certain sales. As the United States did not appeal the Panel's substantive findings on this claim, and the Appellate Body had upheld the Panel's finding below on the scope of the measures in this proceeding, the Appellate Body did not disturb the Panel's substantive findings in this regard.
- Terms of reference (DSU Art. 21.5 panels):** On the question of whether and to what extent a panel acting pursuant to Art. 21.5 may assess a measure that the implementing Member maintains is *not* “taken to comply”, but is nevertheless identified in the complainant Member's request for recourse to an Art. 21.5 panel, the Appellate Body noted that it is not up to either the complaining or implementing Member to decide whether a particular measure is one that is “taken to comply”. It explained that a panel's mandate under Art. 21.5 is not necessarily limited to an examination of an implementing Member's measure declared to be “taken to comply”. The Appellate Body noted that “some measures with a particularly *close relationship* to the declared ‘measure taken to comply’ and to the recommendations and rulings of the DSB may also be susceptible to review by a panel acting under Art. 21.5”. The Appellate Body upheld the Panel's finding in this case that the pass-through analysis in the First Assessment Review fell within the Panel's scope of examination of the “measure taken to comply” because of the close connection between the Section 129 determination and the First Assessment Review.⁴ The fact that the First Assessment Review was not initiated in order to comply with the DSB's recommendations and operated independently of the Section 129 determination was not sufficient to overcome the multiple and specific links between the final countervailing duty determination, the Section 129 Determination, and the pass-through analysis in the First Assessment Review.

¹ *United States – Final Countervailing Duty Determination with respect to Certain Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*

² Section 129 of the US Uruguay Round Agreements Act provides the legal basis for the US to implement adverse WTO decisions by making a re-determination(s) on the issues found to be WTO-inconsistent by the Panel/AB.

³ The “First Assessment Review” in this case refers to the US first administrative review of the countervailing duties on imports of softwood lumber from Canada, which provided for (i) retrospective final assessment of the countervailing duties to be levied on import entries of softwood lumber from Canada between 22 May 2002 and 31 March 2003; as well as (ii) the basis to set the cash deposit rate to be levied on imports of softwood lumber from Canada as of 20 December 2004.

⁴ For example, the Appellate Body referred to the following connections in this case: the same subject-matter (i.e. countervailing duty proceedings), the same product at issue (i.e. softwood lumber), the same “pass-through” methodology used, the same relationship with the USDOC's Final Countervailing Duty Determination, the timing of the publication and effective dates of both proceedings, and the fact that the cash deposit rate resulting from the Section 129 Determination was updated or superseded by the cash deposit rate resulting from the First Assessment Review.