***** CHECK AGAINST DELIVERY *****

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)

Oral Statement of the United States of America at the Meeting of the Appellate Body

October 12, 2005

Introduction

1. Good morning Madame Chair, members of the Division. The United States appreciates this opportunity to present its views.

2. In agreeing to Article 21.5, WTO Members agreed to expedited procedures to address a very specific issue: the existence or consistency of measures taken to comply with the recommendations and rulings of the DSB. The normal procedures under the DSU are available for all other challenges. Because Article 21.5 review is so specific, and provides for a time frame that is only half the minimum for normal panel proceedings, it is limited to the sole issue for which it was designed.

3. Despite this, Canada supports and even expands on the Panel's already overbroad reading of the reach of Article 21.5 proceedings. In so doing, it glosses over the important jurisdictional limitations of Article 21.5. As the Appellate Body has said, Article 21.5 proceedings "do not concern just *any* measure of a Member of the WTO; rather Article 21.5 proceedings are limited to those 'measures *taken to comply*' with the recommendations and rulings' of the DSB."[1]

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[1] *Canada - Measures Affecting the Export of Civilian Aircraft - Recourse by Brazil to Article 21.5 of the DSU*, WT/DS70/AB/RW, Report of the Appellate Body adopted 4 August 2000, para. 36 (emphasis in original).

The First Assessment Review is Not a Measure Taken to Comply

4. In support of its claim that the First Administrative Review is a measure taken to comply, Canada incorrectly argues that it challenged "definitive countervailing duties on Canadian softwood lumber" (implying that somehow it had challenged the assessment of duties), that the Section 129 Determination "no longer applies," and that the First Assessment Review "replaces and effectively undoes" the measure taken to comply (the Section 129 Determination).[2]

5. Canada is wrong on all counts. The First Assessment Review is not a measure taken to comply with the recommendations and rulings of the DSB in this dispute.

The First Assessment Review is a Separate Process, Begun Before There Was Anything to Implement

6. First, Canada seeks to re-write history by arguing that a measure that resulted from an established statutory process, that was undertaken pursuant to a request by Canada among others, and that was initiated eight months before the DSB's recommendations and rulings were even adopted, is a measure "taken to comply." Yet that review was nearly half completed before the recommendations and rulings were adopted. Thus, even though the First Assessment Review was issued after the recommendations and rulings, the timing of the review indicates that it was not taken to comply with the recommendations and rulings – it was taken for an entirely different purpose and under an entirely unrelated timetable. It was initiated pursuant to a statutory requirement that assessment reviews be initiated if an interested party requests such a review during the anniversary month of the countervailing duty order; and it was conducted within a schedule dictated by statute. It was not initiated to establish a prerequisite for the imposition of a

[2] *See, e.g.*, Canada Appellee Submission, paras. 1 and 4.

countervailing duty, as were the investigation and the Section 129 Determination, and it was not initiated for the purpose of implementing any recommendations and rulings.

7. Second, Canada did not challenge the assessment of duties. The DSB's recommendations and rulings addressed Commerce's actions in the Final Countervailing Duty Determination, a determination that established the existence and amount of the subsidy. They did not address the First Assessment Review and that Review was not taken in response to the DSB's recommendations and rulings. To implement the recommendations and rulings, Commerce issued a new determination, the Section 129 Determination. In that determination, Commerce revised the original final determination by conducting the recommended pass-through analysis. The Section 129 Determination was, therefore, the measure taken to comply.

8. Unlike the Section 129 Determination, which addressed the inconsistency identified by the Appellate Body, the First Assessment Review has no relevant relationship to either the recommendations and rulings or the Section 129 Determination. The First Assessment Review was conducted for the purpose of *assessing* final countervailing duties on imports during a period *not even examined* in the investigation.

9. The First Assessment Review would have been conducted, upon request, regardless of the existence of any recommendations and rulings, and assessment reviews are being and will continue to be conducted in the future, if requested. Further, as a consequence of the different purposes and timing, the extensive administrative record developed in the First Assessment Review is distinct from the administrative records developed in the investigation and the Section 129 Determination.

10. For all of these reasons, and despite Canada's arguments to the contrary, the First

Assessment Review cannot be considered a "measure[] taken to comply".

The First Assessment Review Did Not Supercede, Replace, Undo Compliance With, or Render Non-Existent the Section 129 Determination

11. Contrary to Canada's arguments, the "existence" and "consistency" of the Section 129 Determination is undisturbed – it has not been superceded, replaced, undone or rendered non-existent by the First Assessment Review.[3] Canada misrepresents the panel report in claiming that the panel found otherwise.[4] The Section 129 Determination confirmed the existence and amount of the subsidy and thus formed one of the bases under Article 19.1 for the continued imposition of countervailing duties (injury being the other). The Section 129 Determination did not consider the amount of duties to be assessed on imports. By way of contrast, the First Assessment Review was concerned only with establishing the final duty to be assessed on entries made during the appropriate period of review and was not concerned with the imposition of countervailing duties. Given this significant qualitative difference between investigations and assessment reviews, *i.e.*, between imposition and assessment, there is no basis for Canada's claim that the Section 129 Determination was replaced or superceded by the First Assessment Review.

12. Nonetheless, Canada presents two theories for including the First Assessment Review in this proceeding: (1) there is an "identity of subject matter" between the First Assessment Review and the Section 129 Determination, and (2) there supposedly is "overlap" between the application and the effect of the Section 129 Determination and the First Assessment Review.

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[3]Canada Appellee Submission, paras. 32, 34, 35.

[4]Canada Appellee Submission, para. 41, citing Article 21.5 Panel Report, para. 5.2.

These theories, however, do not bring the First Assessment Review within the scope of Article 21.5 review. Neither "identity of subject matter" nor "overlap" of application and effect are standards under Article 21.5. Indeed, those words appear nowhere in Article 21.5. Canada is simply seeking to re-write Article 21.5, and Canada appears also to be seeking to re-write the panel report. In that report (at paragraph 4.41), the panel found that the First Assessment Review was within the scope of DSU Article 21.5 because "there is in fact considerable overlap in the effect of" the First Assessment Review and the Section 129 Determination. The panel was basing its finding simply on the overlap of effects. This is not the first time that the Appellate Body has been called on to examine an "effect test" theory. In *Poultry*, the Appellate Body found that "the notion of measures having the 'same effect' is too vague and could undermine the requirement of specificity and the due process objective enshrined in Article 6.2." The same reasoning applies to the panel's vague "effect test."

13. Canada seeks to convert the panel's "effects test" into an analysis of whether the First Assessment Review "undoes" the effect of the Section 129 Determination. The panel made no such finding. And to the extent Canada is simply arguing that the "measure[] taken to comply" is "nonexistent" because the First Assessment Review "undoes" the "effect" of the Section 129 Determination, Canada errs.

14. The original measure challenged by Canada in this dispute was Commerce's Final Countervailing Determination in the investigation. That determination was a basis for imposition of a countervailing duty. To bring that measure into conformity, Commerce issued a revised final determination, *i.e.*, the Section 129 Determination. The Section 129 Determination is a basis for *imposition* of the countervailing duty – and the Section 129 Determination still

applies. The First Assessment Review – which provides for *levying* of duties – did not and could not replace or undo the Section 129 Determination. The fact that the First Assessment Review established final duties on entries that had been subject to the cash deposit rate established in Commerce's Final Countervailing Duty Determination does not transform the First Assessment Review into a "measure[] taken to comply with the recommendations and rulings" adopted by the DSB.

15. Moreover, Canada is wrong that the "only practical effect" of the Section 129 Determination was the "replacement of the cash deposit rate calculated under the Final Countervailing Duty Determination."[5] Rather, that effect on the cash deposit rate is merely incidental to the Section 129 Determination's actual legal effect, which is to confirm that there is a basis for the imposition of a countervailing duty. Canada offers no evidence that the First Assessment Review in application or effect vitiates the actual effect of the Section 129 Determination because it cannot. The legal significance of the First Assessment Review is that it establishes the final duty to be assessed on entries made during the period May 22, 2002 through March 31, 2003 and a cash deposit rate to be applied to entries entered on or after December 20, 2004. Thus, the legal significance of the two measures is entirely different.

Imposition versus Levying

16. Canada also attempts to blur the legal distinction under the SCM Agreement between the final determination in an investigation, which justifies the imposition of a countervailing duty, and the final results of the assessment review, which justifies the final assessment or levying of

[5]Canada Appellee Submission, para. 34.

the duties. Notably, Canada states, at paragraph 46 of its Appellee Submission, that "duties are determined and levied in both an original investigation and an assessment review." In doing so Canada argues that collecting a cash deposit as a result of a countervailing duty investigation is the same as the final assessment or levying of the duty.

17. Canada's analysis is incorrect, and conflates two distinct concepts, both in U.S. law, and in the SCM Agreement. We have already discussed how the investigation and review are distinct under U.S. law. In addition, and contrary to Canada's arguments, the SCM Agreement also expressly distinguishes between *imposition* of a countervailing duty as a consequence of an "investigation" of subsidies and injury,[6] and the *levying* of an actual amount of countervailing duties as a result of a subsequent "assessment proceeding."[7] "Imposition" of a countervailing duty, as the term is used in Article 19.1, occurs at the completion of an investigation, after affirmative findings of both injury and subsidization have been made and a countervailing duty is put in place as a border measure – an "order" in U.S. parlance. In contrast, "levying" of a countervailing duty is "the definitive or final legal assessment or collection of a duty or tax"[8] – "assessment" in U.S. parlance. Article 19.3 also makes this distinction, stating that once a countervailing duty is "imposed" with respect to a product, the duty is to be "levied" on imports of that product "in appropriate amounts" and on a non-discriminatory basis.

18. The recommendations and rulings adopted by the DSB in this dispute encompass only the Final Countervailing Duty Determination resulting from the investigation – a determination that

[6] *See* SCM Agreement, Articles 11 and 19.1.
[7] *See* SCM Agreement, fn. 52.
[8] SCM Agreement, fn. 51.

established the existence and amount of the subsidy under Article 19.1 of the SCM Agreement and, hence, the right to impose a countervailing duty. The recommendations and rulings did not concern the actual levying of countervailing duties as recognized by footnote 52 of the SCM Agreement.

19. The Panel erroneously conflated the Final Countervailing Duty Determination and the First Assessment Review primarily on the basis that both the investigation and the assessment review involved duties on subject merchandise. Canada, in its Appellee Submission, does something similar. Because the SCM Agreement defines "levy" as "the definitive or final legal assessment or collection of a duty,"[9] Canada erroneously concludes that the "collection" of cash deposits – which results from imposition of an order following a final countervailing duty determination – is the same as the collection of definitive duties – which results from the final results of an assessment review.[10]

20. As the United States explained in its Appellant Submission and Additional Memorandum, if the final determination in a countervailing duty investigation is affirmative, Commerce will require Customs to collect a cash deposit of *estimated* countervailing duties on entries of subject imports. The final liability for payment of countervailing duties on those entries is subsequently determined in an assessment review. The "levying" or "final legal assessment or collection" of the countervailing duty calculated in the assessment review is the consequence of the assessment review. Collection of cash deposits is not equivalent to "levying" of countervailing duties. Canada's quote from Exhibit CDA-87 in footnote 49 of its Appellee

[9]SCM Agreement, footnote 51.
[10]Canada Appellee Submission, paras. 54-58.

Submission is incomplete. The United States concluded its explanation of the term "collection" by stating that "under the United States' retrospective system, the final legal assessment or collection occurs at a later time" – in other words, after the initial collection of cash deposits of estimated duties.[11] Consequently, Canada is wrong to claim that the SCM Agreement itself does not recognize the distinction between the imposition of countervailing duties and the assessment of those duties.

The Specific Recommendations and Rulings at Issue

21. As we have already noted, Article 21.5 is addressed to measures taken to comply with recommendations and rulings adopted by the DSB – and the recommendations and rulings adopted by the DSB in this dispute dealt solely and explicitly with Commerce's actions regarding pass through in Commerce's Final Countervailing Duty Determination. The United States implemented based on those explicit recommendations and rulings – specifically, Commerce revised its Final Countervailing Duty Determination.

22. The Panel, however, went beyond the recommendations and rulings, erroneously concluding that a second measure, the First Administrative Review, was also a "measure[] taken to comply" within the scope of Article 21.5.

Object and Purpose is Not an Independent Basis Overriding the Text of Article 21.5

23. Let me turn now to Canada's final theory – that the U.S. position as to the scope of Article 21.5 review is contrary to the object and purpose of the DSU to secure prompt settlement of a dispute. Canada's approach reverses the customary rule of treaty interpretation. In effect,

[11]U.S. Answers to the Second Set of Questions from the Panel, *United States - Anti-Dumping Measures on Cement from Mexico*, Question 117, para. 117 (Exhibit CDA-87).

Canada proposes applying its interpretation of the object and purpose of the DSU in spite of the ordinary meaning of the terms of Article 21.5. Canada's approach runs afoul of the Appellate Body's admonition that "the treaty's 'object and purpose' is to be referred to in determining the meaning of the 'terms of the treaty' and not as an independent basis for interpretation."[12] Indeed, as the Appellate Body stated recently, the objectives of the DSU "cannot be pursued at the expense of complying with the specific requirements and obligations of Article 6.2."[13] This applies equally with respect to Article 21.5.

24. Canada's approach implies that only Article 21.5 proceedings can secure prompt settlement of a dispute. But this would mean that normal panel procedures of the DSU do not secure a prompt settlement of a dispute and so are contrary to the "object and purpose" of the DSU. This makes no sense of course.

Commerce Applied the Section 129 Determination Pass-Through Methodology in the First Assessment Review

25. In connection with "object and purpose", Canada complains that, unless the First Assessment Review is swept into these proceedings, it will have to commence new dispute settlement proceedings to challenge actions taken in the assessment review, and raises the specter of having to challenge repeatedly the assessment review results. Indeed, it is true that the normal Article 6.2 dispute settlement procedures are the appropriate route to challenge Members measures that are not measures "taken to comply". But Canada's concerns are misplaced.

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[12] *Japan - Taxes on Alcoholict Beverages*, WT/DS8 & 10-11/AB/R, Report of the Appellate Body adopted 4 October 1996, page 11, footnote 20.

[13] *European Communities - Customs Classification of Frozen, Boneless Chicken Cuts*, WT/DS269 and 286/AB/R, Report of the Appellate Body adopted 27 September 2005, para. 161.

Canada originally challenged Commerce's failure to conduct a pass-through analysis in its Final Countervailing Duty Determination. Canada prevailed in part on this claim, which resulted in the Section 129 Determination. In the First Assessment Review, though not a measure taken to comply with the DSB's recommendations and rulings, Commerce conducted a pass-through analysis based on its understanding of the obligations in the SCM Agreement as clarified by those recommendations and rulings.

Canada's Comments on the U.S. Additional Memorandum

26. Finally, we take issue with certain of Canada's comments on our Additional Memorandum. In the interest of time, we mention only a few of those issues now. For example, Canada overstates the precedential nature of Court of International Trade decisions. Additionally, Canada's reference to the regulatory definition of "proceeding" should not be interpreted as an indication that a "proceeding" is reviewable by U.S. courts. Lastly, despite Canada's statements on statutory and regulatory provisions concerning payment of countervailing duties, U.S. law distinguishes between collection of estimated countervailing duties and assessment of final duties.

Conclusion

27. In summary, Madame Chair, members of the Division, for the reasons we have just stated, as well as those in our written submission, the United States respectfully requests that the Appellate Body reverse the specific findings of the Panel as set forth in our Appellant Submission. It is clear that Canada would like to be able to use the expedited procedures of Article 21.5 to challenge any measure it wants, but that is not what was agreed by Members in the DSU. Article 21.5 is a special provision for limited purposes, and the panel did not respect

those limitations. We look forward to addressing any questions the Appellate Body may have over the course of this hearing. Thank you.