United States – Final Dumping Determination on Softwood Lumber from Canada

WT/DS264

Closing Statement of the United States
First Meeting of the Panel

June 18, 2003

1. Mr. Chairman, members of the Panel, we have appreciated the opportunity to present our views on the issues in this case. The Panel's questions and comments reflected a thorough review of the submissions and a careful consideration of the arguments. We are grateful for the time and effort you have put into this. We would like to use our closing remarks to tie up a few loose ends.

2. We noted with interest Canada's acknowledgment that facts are always relevant to considering the issues presented. The Panel is not considering questions in the abstract but in a particular factual context. This is an overarching theme to which we will return with respect to several different issues.

3. Returning briefly to the matter of our requests for preliminary rulings, we noted with interest Canada's statement this morning that it will be submitting a seven page expert's memorandum explaining the methodology applied to create Exhibit CDA-77. We look forward to receiving that memorandum. However, we believe that the very fact that Canada's expert requires seven pages to explain the methodology underscores our point that the Exhibit is new evidence. Such complex new information should first have been examined by Commerce in the investigation. Moreover, it is now abundantly clear that Canada's regression analysis is nothing like the summary document at issue in *EC – Bed Linen*.

4. There has been some discussion of standard of review. We wish to remind the Panel that, contrary to Canada's assertion, the United States does not advocate "total deference." (*See* Canada's Oral Statement, para. 7.) We advocate nothing more than what is called for in Article 17.6 of the AD Agreement. The question under Article 17.6(i) is whether an investigating authority's findings of fact were proper, and whether its evaluation was unbiased and objective. As several panels have found, the question is not what the panel would have done had it been the investigating authority. Our discussion on this point has emphasized the highly fact-specific nature of the issues presented and observed that re-weighing the evidence, as Canada has urged, finds no basis in Article 17.6.

5. I would like to make a brief reply to Canada's oral statement with respect to Commerce's methodology for calculating an overall dumping margin for a given producer. Canada took issue with our reliance on negotiating history as additional support for our interpretation of Article 2.4.2. (Canada's Oral Statement, para. 67.) Canada notes that, under the Vienna Convention, recourse to negotiating history is available only in two cases: first, to confirm the "ordinary

meaning [of] the terms of the treaty in their context and in the light of its object and purpose," and, second, to determine meaning when interpretation under Article 31 of the Vienna Convention leaves the meaning ambiguous or obscure. As we explained in our first written submission, we relied on negotiating history here for the first of these reasons. The history confirms the ordinary meaning of the terms of Article 2.4.2 in their context and in light of the AD Agreement's object and purpose.

6. Canada argues that, in light of *EC – Bed Linen*, the ordinary meaning of Article 2.4.2 is clear, but is contrary to our interpretation, and, therefore, our recourse to negotiating history is not appropriate. The flaw in this reasoning is the premise that the meaning of Article 2.4.2 is clear simply because the Appellate Body has spoken to the question. As the panel in *Argentina--Peaches* recently demonstrated, an Appellate Body interpretation of a treaty provision may well be reevaluated by a subsequent panel. (Panel Report, *Argentina–Definitive Safeguard Measure on Imports of Preserved Peaches*, WT/DS238/R, para. 7.24.) In this case, the fact that the Appellate Body in another case adopted a particular interpretation of Article 2.4.2 does not preclude the United States from referring to negotiating history to corroborate a contrary interpretation that it believes is accurate based on the ordinary meaning of the terms, in their context, and in light of the treaty's object and purpose.

7. I will now turn to my colleague, who will highlight some key points that have been raised during the course of our meetings.

8. First, on initiation, as Canada acknowledged during our discussion of *Guatemala Cement*, no panel has found an obligation on investigating authorities separate from the obligation under Article 5.3. This is with good reason, as Article 5.2 imposes no such obligation. It describes the contents of an application. The consequence for an application failing the Article 5.2 criteria is that an investigating authority could find, under Article 5.3, that it lacks sufficient evidence to initiate.

9. Also on initiation, yesterday's discussion highlighted the flaw in Canada's contention that Commerce did not rely on "actual transactions" in its decision to initiate. It *did* rely on actual transactions, as reflected in published data and affidavits from U.S. producers.

10. We also recall Canada's response when asked about its own practice regarding initiation. Canada stated that once the investigating authority is seized of jurisdiction over an investigation, it does not "look back" to the petition. That strikes us as being at odds with the rule of continuous evaluation of a petition that Canada advocates under Article 5.8.

11. With respect to product under consideration, Canada's comments further demonstrated that the rule they advocate finds no basis in Article 2.6. Yesterday's discussion highlighted the circularity in Canada's argument. Canada argues that the concept "like product" delimits the concept "product under consideration." But, it is undeniable that, under Article 2.6, "product

under consideration" is the point of reference for defining like product. Under Canada's interpretation, there is no logical end to this loop.

12. Moreover, in its presentation, Canada went beyond arguing that Article 2.6 imposes limits and asserted where those limits should have been drawn in this case. Without any basis in the AD Agreement, it purported to identify a "core" category comprising "90 percent of the products covered," and alleged that "Commerce added in another 10 percent of products." (Canada's Oral Statement, paras. 34 and 35.) In telling the Panel where to draw the line, Canada is urging the Panel to find facts as if it were the investigating authority. As we already have explained, that is not an appropriate role for a panel.

13. Canada suggests that the absence of any limits on an investigating authority's definition of the "product under consideration" could lead to "absurd result[s]." In response, we come back to Canada's observation that facts matter. The absurd circumstances that Canada hypothesizes simply are not at issue here.

14. Regarding Canada's claim for an adjustment for differences in dimension, Canada has made several misleading and unsubstantiated assertions. For example, Canada's heading V in its Oral Statement claims that, "The United States contravened Article 2.4 by not taking into account dimension of softwood lumber in comparing export price to normal value." This statement is grossly inaccurate. Commerce took dimension into account by accepting dimension in its model match methodology. Only a small percentage of comparisons, based on quantity, involved non-identical dimensional matches. The issue in this case is about the differences in dimension on the few similar, and mostly minor, matches in the products compared.

15. Similarly, Canada argues that all the parties, including the U.S. petitioners, asserted that dimension affected price. (Canada Oral Statement at para. 54.) Canada cites to no record evidence to support this claim. The parties were in general agreement that width, thickness and length should be included in Commerce's product matching hierarchy. But, they did not express a common view regarding the impact on price of these dimensional differences. Indeed, Canada now concedes that "the market established prices based on the supply and demand for each product, not because one product is smaller or larger than the other." (Canada Oral Statement at para. 59.)

16. Canada argues that the United States must be found to have concluded, in effect, that differences in dimension affected price comparability because Commerce accepted dimension in its product matching hierarchy. (Canada Oral Statement at paras. 55 and 56.) But, Canada's conclusion does not follow from its premise. Commerce's matching criteria do not dictate what price adjustment it must make.

17. Canada confuses two separate decisions made by Commerce. Commerce's decision to recognize dimension as a matching criterion was made without making any determination regarding price comparability. This is not in any way unusual. The product matching decision is

made early in the investigation, before facts relevant to price comparability are gathered and evaluated. The product matching decision normally reflects the parties' agreement concerning market preferences, market demand, and possibly a general recognition of the commercial significance of the characteristic, without establishing or measuring any direct effect on price of these physical differences.

18. Finally, I note that we have commented at some length today on cost calculation issues. We have nothing further to add on this subject at this time. We welcome the opportunity to elaborate in our written answers.

19. Again, I want to join my colleague in thanking you for your time and the opportunity we have had over the last two days to present and clarify our arguments.