United States - Final Dumping Determination on Softwood Lumber from Canada

WT/DS264

Opening Statement of the United States First Meeting of the Panel

June 17, 2003

1. Mr. Chairman, members of the Panel, the United States delegation appreciates this opportunity to present its views on the issues in this dispute. We do not intend to offer a lengthy statement today; you have our written submission, and we will not repeat all of the arguments that we made there. Instead, we will focus on the key legal issues that arise from Canada's challenge under the AD Agreement.

Requests for Preliminary Rulings

2. Mr. Chairman, in our first submission, we request two preliminary rulings. I want to comment briefly on these and on Canada's June 10th response. First, Canada has, in its first written submission, asserted claims not identified in its request for the establishment of a panel. Specifically, Canada improperly added to the list of provisions it claimed were violated by virtue of Commerce's definition of the product under consideration.

3. In its response to the United States' preliminary objection, Canada protests that it has not added any claims but only "additional arguments."[1] However, statements that actions by Commerce were "inconsistent with U.S. obligations" under particular articles of a WTO agreement plainly amount to claims under those articles. They are offered as additional legal bases for Canada's complaint. Indeed, the relief Canada requests in its submission, and that it

[1] Canada's Response to Preliminary Objections, paras. 2 and 13 (June 10, 2003).

has repeated before the Panel today, is a finding that the United States acted inconsistently with AD Agreement provisions other than those cited in its panel request.[2] Canada now states that "[t]he legal basis for the claim remains Article 2.6."[3] If this is so, then we ask that the Panel rule that it will consider Canada's claim only with regard to Article 2.6.

4. The requirement that treaty provisions forming the basis of a claim be expressly identified in a panel request is by now well established. The Appellate Body made a finding on this exact issue in its recent report in *German Steel*.[4] There, the Appellate Body found that a failure to identify particular treaty provisions in a panel request placed those provisions beyond the panel's terms of reference.[5]

5. Canada purports to rely on the Appellate Body report in *Korea–Dairy Safeguard* for guidance on the preliminary objection at issue here. However, that report provides no support for Canada's position. The issue there was whether a "mere listing" of treaty provisions, without further elaboration, satisfied the requirements of Article 6.2 of the DSU. The Appellate Body found that there may be cases in which a mere listing suffices, and there may be other cases in which it does not. However, the Appellate Body took it as a given that listing of the treaty

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[2] Canada's First Written Submission, para. 279(3) (Apr. 11, 2003).

[3] Canada's Response to Preliminary Objections, para. 16 (June 10, 2003).

[4] Appellate Body Report, *United States–Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products From Germany*, WT/DS213/AB/R, adopted Dec. 19, 2002, para. 172.

[5] *Id.*

provisions at issue was "a minimum prerequisite."[6] The factors that Canada cites in paragraph 6 of its June 10th response come into play only if that minimum prerequisite has been met, which was not the case here. Accordingly, the Panel should decline to consider Canada's claims that do not even meet the minimum prerequisite.

6. The United States' second request for a preliminary ruling is with respect to Canada's improper introduction in its first submission of facts not available to Commerce in the underlying investigation. Specifically, Canada put before the Panel Exhibit CDA-77, a regression analysis that the Canadian respondents had not introduced in proceedings before Commerce.

7. This analysis was prepared by respondent Tembec six months after the softwood lumber investigation was completed. Canada's attempt to have the Panel consider this exhibit is simply not consistent with Article 17.5(ii) of the AD Agreement, which limits a panel's examination to "facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member." Tembec's regression analysis was not made available to Commerce during the investigation.

8. Canada claims that Commerce's decision to deny a price-based adjustment for dimensional differences was "unexpected." That claim is not credible. Commerce's requirements for establishing such an adjustment are clear from its questionnaire and its regulations. Indeed, the Canadian parties briefed the issue and Commerce addressed their arguments in the final determination. This regression analysis could have been submitted during the investigation. This would have given Commerce an opportunity to analyze the manipulation

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[6] Appellate Body Report, *Korea–Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted Jan. 12, 2000, para. 124.

of data. It also would have allowed interested parties to comment on and respond to the manipulation in defense of their interests. This was not done, and it comes too late now.

9. Had the Tembec regression been presented to Commerce during the investigation, Commerce could have evaluated it to clarify and identify the data used as well as the fundamental assumptions employed. For example:

- It could have asked which if any of the submitted databases was used in this regression.
- It could have asked what changes if any were made to the data prior to manipulation.
- It could have asked the respondent to provide a detailed narrative description of the model, methodology, and all underlying assumptions.
- It could have asked the respondent to provide a narrative description detailing how the computer program achieves the results presented.

Because the regression analysis was presented only after the investigation, Commerce didn't have a chance to ask these or other questions necessary to evaluate the analysis.

10. Contrary to Canada's assertion[7], this regression analysis is not the "exact same type of document" that was at issue in the *EC-Bed Linen* case. At issue in *EC - Bed Linen* was a table summarizing the declarations of industry support, evidence that had always been available to the EC investigating authority.[8] In contrast, here, the submitted regression analysis is not a mere

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[7] Canada's Response to Preliminary Objections, para. 27.

[8] Panel Report, *EC-Antidumping Duties on Imports of Cotton-type Bed Linen from India*, WT/DS141/R, adopted Oct. 30, 2000, para. 6.42-6.43 and Annex 2-2.

summary table of record information. It is a calculation that attempts to measure quantitative relationships between variables.[9] As the Panel stated in *U.S.--Hot-Rolled Steel*, it is not appropriate for a panel to consider facts or evidence presented by a party to demonstrate error by an investigating authority, unless those facts or evidence had been made available to the investigating authority during the investigation.[10] For these reasons, Exhibit CDA-77 should not be considered by the Panel.

11. This concludes our remarks concerning our requests for preliminary rulings. I will now turn to my colleague, who will address Canada's principal claims.

Overview

12. Canada raises diverse claims regarding Commerce's initiation and conduct of its softwood lumber investigation. Those claims fall into two general categories. First, with respect to several of Canada's claims, the obligation asserted simply has no basis in the AD Agreement. Second, with respect to other claims, Canada's arguments amount to a request for the Panel to undertake its own investigation and make its own factual determinations.

13. Under the first category comes Canada's contention that Commerce should not have initiated its softwood lumber investigation (or, alternatively, that Commerce should have terminated the investigation after initiation). Canada urges reversal of Commerce's decision to initiate without regard to the sufficiency standard in Article 5.3.

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[9] *See* definition of "regression" at *New Shorter Oxford English Dictionary* at 2529 (1993).

[10] Panel Report, *United States–Antidumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, adopted Aug. 23, 2001, para. 7.6.

14. Also under this first category, Canada contends that Commerce erred in identifying the product under consideration. As with its initiation argument, the obligation on which Canada purports to rely is non-existent. The AD Agreement contains no provision on how an investigating authority must identify the product under consideration.

15. Finally, Canada's claim regarding Commerce's method for combining individual dumping margins into a single, overall dumping margin rests on an asserted obligation that has no basis in the AD Agreement. Indeed, the obligation Canada identifies would require an interpretation of Article 2.4.2 that deprives key terms in that provision of any meaning.

16. Because dispute settlement cannot add to or diminish rights and obligations under the WTO agreements[11], the Panel should reject each of Canada's claims in this first category.

17. The second category of claims concerns fact-intensive antidumping calculation issues. While these issues are complex, Canada's argument in each case is that Commerce should have done its calculation differently. However, even if this Panel might have established or evaluated the facts differently, that is not a basis for concluding that Commerce's determinations are inconsistent with the AD Agreement.

18. This category includes Canada's claim that Commerce should automatically have made a price adjustment for certain dimensional differences between products for which sales were compared in determining dumping margins. It also includes a series of challenges to company-specific calculations Commerce made in establishing dumping margins.

19. I will now turn briefly to each of Canada's principal claims.

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[11] DSU, Article 3.2

Initiation

20. Canada's challenge to Commerce's initiation of its softwood lumber investigation requires consideration of the standard for initiation. That standard, set forth in Article 5.3, is "whether there is sufficient evidence to justify the initiation of an investigation." A similar sufficiency standard governs a determination of whether to terminate an investigation under Article 5.8. Neither provision requires evidence greater than sufficient evidence. Yet, Canada disregards the sufficiency standard. It asks this Panel to overturn Commerce's determination because the petitioners did not include in their application certain information alleged to have been reasonably available to them. Regardless of the sufficiency of the evidence before Commerce, Canada maintains that Commerce should have declined to initiate.

21. Canada relies primarily on Article 5.2, arguing that an investigating authority should decline to initiate an investigation unless the application contains *all* information reasonably available to the petitioners regarding dumping, injury, and causal link. We note that the European Communities observes in its third-party submission, Article 5.2 "imposes an obligation only on the applicant but not on the investigating authority."[12] Indeed, Article 5.2 describes the contents of an application for a dumping investigation. It does not contain a standard for accepting or rejecting an application. That standard is set forth in Article 5.3.

22. Canada rests its argument on the reference in the *chapeau* of Article 5.2 to "such information as is reasonably available to the applicant" on matters listed in the four sub-paragraphs that follow. Canada improperly reads the word "all" into this phrase. In fact, the

[12] European Communities Third Party Submission, para. 5 (May 19, 2003).

reference to information "reasonably available" simply sets a limitation on what is expected of petitioners. An applicant seeking relief under a country's antidumping laws is not expected to go to extraordinary lengths to collect evidence for its application. It is only required to supply information "reasonably available." Yet, Canada turns this limitation into a limitless obligation. Under this reading, an investigating authority's discovery of any single, arguably related fact not included in the application would require termination of the investigation. Canada's all-or-nothing approach finds no support in the text of the AD Agreement.

23. As detailed in the United States' first written submission, the evidence of dumping in the softwood lumber petition was sufficient to support initiation.[13] The evidence included country-wide, industry-wide cost and price data from multiple reliable sources.[14] The information that Canada claims was improperly excluded could not have altered the adequacy and accuracy of the information actually included.

Product Under Consideration

24. Like its argument on initiation, Canada's argument on "product under consideration" relies on an obligation that has no basis in the AD Agreement. Canada rests its argument primarily on Article 2.6. Yet, Article 2.6 contains no obligation at all on how an investigating authority is to define the product under consideration in an investigation. It sets forth a rule of interpretation for the term "like product." It provides that whether a product is a "like product" is to be determined on the basis of a comparison to the "product under consideration." However, it

[13] Canada does not challenge the sufficiency of the application with regard to injury and causal link. Accordingly, we confine our discussion to evidence of dumping.

[14] *See* United States first written submission, paras. 50-62.

does not in turn instruct investigating authorities on how to define the product under consideration. That understanding of Article 2.6 is reflected in the diverse practices of many WTO Members, including Canada itself. It is noteworthy that a recent Rules Negotiating Group paper filed by several WTO Members acknowledged that "the AD Agreement does not currently contain any provision defining the product under investigation" and urged that this point be addressed in the ongoing negotiations.[15]

25. Under Article 2.6, the existence of a "product under consideration" is taken as a given. It is the starting point for interpretation of other terms in the AD Agreement. No matter how an investigating authority defines the product under consideration, that becomes the basis for determining whether other products are "like products."

26. Canada appears to turn the text of Article 2.6 on its head. Instead of taking "product under consideration" as the starting point, Canada seems to take "like product" as the starting point and to argue that "like product" constrains how an investigating authority defines the product under consideration. Thus, in its response to the U.S. requests for preliminary rulings, Canada acknowledges that it is asking the Panel "to address whether and how Article 2.6's 'like product' definition delimits the scope and range of different products . . . an investigating authority may cover in a single anti-dumping investigation."[16] The implication of that position is that, in this investigation, Commerce should have first identified several distinct like products

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[15] Paper filed by Permanent Missions of Brazil; Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Japan; Korea; Norway; Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; Singapore; Switzerland; and Thailand, TN/RL/W/10 (June 28, 2002).

[16] Canada's Response to Preliminary Objections, para. 14 (June 10, 2003).

and then identified corresponding products under consideration on that basis.

27. Canada's interpretation finds no support in Article 2.6 or any other provision of the AD Agreement and, in fact, it defies simple logic. Under Article 2.6, "like product" does not "delimit" the term "product under consideration." It is the other way around.

28. The very term "like product" implies a point of reference — in other words, the thing that the product is like. That point of reference is the product under consideration. Canada's interpretation is contrary to the structure of Article 2.6 and should be rejected.

Price Adjustment for Certain Dimensional Differences

29. Canada's third argument concerns Commerce's method for comparing sales of softwood lumber in Canada to sales of softwood lumber in the United States. Canada contends that the Canadian respondents were entitled to an adjustment to home market softwood lumber prices whenever the products compared had any dimensional differences. However, the Canadian respondents were unable to substantiate price adjustment claims during the investigation, and Commerce, therefore, properly declined to make such adjustments.

30. Consistent with Article 2.4, Commerce makes price adjustments for differences in the physical characteristics of merchandise when a party demonstrates that a physical difference between the product sold in the U.S. market and the product sold in the foreign market has an effect on prices. But such an Article 2.4 adjustment is not automatic, as the panel in *EC – Pipe Fittings* recently found.[17] Under Article 2.4, the requirement to make an adjustment applies only to "differences which are also demonstrated to affect price comparability," and the determination

[17] Panel Report, *European Communities–Anti-dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/R, circulated Mar. 7, 2003, para. 7.158.

whether to make due allowance is to be decided "in each case, on its merits."

31. In considering Canada's claim, it is important to recognize that, in the majority of product comparisons, Commerce compared softwood lumber products of identical thickness, width and length. If identical products were not available for comparison, Commerce matched products with the most similar dimensional characteristics available. Thus, unlike the *Argentina – Floor Tiles* case on which Canada relies,[18] the physical differences at issue here were taken into account in selecting the transactions to compare.

32. Despite this approach to ensure a fair comparison, Canada argues that Commerce should have made an automatic price adjustment whenever any similar, rather than identical, dimensional match was made. Canada claims this obligation applied no matter how small the dimensional difference at issue, and despite respondents' failure to demonstrate any impact on price comparability. Nothing in the AD Agreement required a price adjustment under these circumstances.

The Margin Calculation Methodology and *EC – Bed Linen*

33. Let me turn now to the issue of calculation of the overall dumping margin. Canada does not dispute that the United States properly calculated dumping margins on a model-specific, level-of-trade-specific basis. What Canada takes issue with is how those multiple dumping margins were combined to establish a company-specific overall dumping margin.

34. Let's assume, for example, that a company sold only two models and made sales of both models in the United States and Canada all at the same level of trade. And, let's further assume

[18] Panel Report, *Argentina–Definitive Anti-dumping Measures on Imports of Ceramic Floor Tiles from Italy*, WT/DS189/R, adopted Nov. 5, 2001, para. 6.116.

that the pricing of these models was such that there was a 10 percent dumping margin on the first model and no dumping margin on the second model. In fact, for the second model, the U.S. price was higher than the normal value, so that there would be what Canada calls a "negative margin" of 5 percent. What then?

35. Canada's answer is that the negative margin of 5 percent on the second model must be used as an offset to the 10 percent margin on the first model. However, Article 2.4.2 does not require Commerce to offset a dumping margin found on one particular model with non-dumping amounts found on another model. As we discussed in our submission, when the criteria of Article 2.4 are considered, not all export transactions will be equally comparable with all normal value transactions. Moreover, Canada's concept of a "negative margin" or an offset appears nowhere in the AD Agreement.

36. Consider the history of this issue. Under the Tokyo Round Anti-Dumping Code, many Contracting Parties made dumping calculations by comparing weighted-average normal values to individual export transactions, granting no offset for any export transaction that was not dumped. This was consistent with the Code and made sense, considering that antidumping duties are border measures – it was equivalent to collecting antidumping duties on dumped entries but not paying or crediting importers for entries that were not dumped.

37. Article 2.4.2 required Members to change the dumping margin calculation, but not in the way Canada asserts. With respect to the methodology at issue here, Article 2.4.2 requires Members to establish margins of dumping by comparing weighted average normal values with weighted averages of "all comparable export transactions." Rather than calculating dumping margins for each individual export transaction, as before, Members are now required to weight

average "all comparable export transactions" – in other words, all export transactions of the same model sold at the same level of trade. Improperly focusing on the word "all" deprives the term "comparable" of any meaning. It also nullifies the opening phrase in Article 2.4.2, which reads: "Subject to the provisions governing fair comparison in paragraph 4." These terms should provide the starting point for an interpretation of Article 2.4.2. As the panel in *Stainless Steel from Korea* has acknowledged, insertion of the term "comparable" was the only change made to Article 2.4.2 after the Dunkel Draft, and its relevance should not be discounted.[19] However, that is precisely what Canada would have this Panel do: disregard the actual language of Article 2.4.2, thereby creating obligations not agreed upon by the Members in the AD Agreement.

38. The United States recognizes that in making its case, Canada relies heavily on the Appellate Body Report in *EC-Bed Linen*.[20] While that report dealt with the calculation of the overall dumping margin by the EC, the report is not an interpretation of the AD Agreement with any broader applicability. To give the report such weight would be inconsistent with Article IX:2 of the WTO Agreement. Taking a fresh look at the issues is particularly appropriate in this case, because the United States was not a party to the *EC-Bed Linen* dispute, and the report does not address many of the textual arguments presented by the United States in its first written

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[19] Panel Report, *United States–Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip From Korea*, WT/DS179/R, adopted Feb. 1, 2001, para. 6.111 & n. 114: "[I]nsertion of the word 'comparable' into Article 2.4.2 represented the only modification to that Article between the date of the Draft Final Act and the text as adopted. [...] This suggests that its inclusion was not merely incidental but reflected careful consideration by the drafters."

[20] Appellate Body Report, *European Communities–Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/R, adopted March 12, 2001 ("*EC–Bed Linen*").

submission. In short, a full consideration of these textual arguments should lead the Panel to agree with the following statement, made during the consideration of the *EC-Bed Linen* report by the Dispute Settlement Body: "[T]he EC's interpretation of Article 2.4.2 of the Anti-Dumping Agreement, which was based on the recognition that there might be different types or models of the product under investigation, was reasonable and should have been considered as a permissible interpretation of that provision."[21] This statement was made by Canada.

Company-Specific Issues

39. Finally, Canada makes a number of company-specific claims. We have responded to those claims in our first submission and will not elaborate here except to emphasize that the AD Agreement provides only general guidance on how an investigating authority is to establish a producer's cost of production. There are no specific rules on issues such as allocation of general and administrative costs and calculation of offsets. In this investigation, Commerce established the cost of production consistent with the Agreement's general guidance, and what Canada seeks is to have this Panel re-weigh the evidence.

Conclusion

40. This concludes our oral presentation. Thank you for your attention. In the interest of time, we have not addressed all aspects of Canada's claims. We believe that our first written submission has adequately and clearly presented our views on these issues to the Panel. We welcome any questions the Panel may have.

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[21] Dispute Settlement Body, Minutes of the Meeting: Held in the Centre William Rappard on 12 March 2001, WT/DSB/M/101, 8 May 2001, para. 82.