

**BEFORE THE  
WORLD TRADE ORGANIZATION**

***United States - Final Dumping Determination  
On Softwood Lumber from Canada***

WT/DS264

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**EXECUTIVE SUMMARY OF THE ORAL PRESENTATION OF THE**

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**UNITED STATES**

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**AT THE FIRST MEETING OF THE PANEL**

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**June 27, 2003**

## Opening Statement

1. In our first submission, we request two preliminary rulings. First, Canada has, in its first written submission, improperly added to the list of provisions it claimed in its panel request were violated by virtue of Commerce's definition of the product under consideration. In response, Canada protests that it has not added any claims but only "additional arguments."<sup>1</sup> However, statements that actions were "inconsistent with U.S. obligations" under particular articles of a WTO agreement plainly amount to claims under those articles.
2. 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*.<sup>2</sup>
3. Canada purports to rely on the Appellate Body report in *Korea–Dairy Safeguard*. In that case, the Appellate Body took it as a given that listing of the treaty provisions at issue was "a minimum prerequisite."<sup>3</sup> The factors that Canada cites in paragraph 6 of its June 10<sup>th</sup> response come into play only if that minimum prerequisite has been met, which was not the case here.
4. 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. This analysis was prepared by respondent Tembec six months after the 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.
5. Canada claims that respondents did not present the exhibit to Commerce, because 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. 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.
6. Contrary to Canada's assertion<sup>4</sup>, 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.<sup>5</sup> The regression analysis is not a mere summary table.

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<sup>1</sup> Canada's Response to Preliminary Objections, paras. 2 and 13 (June 10, 2003).

<sup>2</sup> 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.

<sup>3</sup> Appellate Body Report, *Korea–Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted Jan. 12, 2000, para. 124.

<sup>4</sup> Canada's Response to Preliminary Objections, para. 27.

<sup>5</sup> 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.

7. On Canada's challenge to Commerce's initiation of its investigation, the standard, in Article 5.3 of the AD Agreement, 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.

8. 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. However, 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.

9. 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 subparagraphs that follow. Canada improperly reads the word "all" into this phrase. In fact, the reference to information "reasonably available" simply sets a limitation on what is expected of petitioners. Yet, Canada turns this limitation into a limitless obligation.

10. The evidence of dumping in the softwood lumber petition was sufficient to support initiation.<sup>6</sup> The evidence included country-wide, industry-wide cost and price data from multiple reliable sources.<sup>7</sup> The information that Canada claims was improperly excluded could not have altered the adequacy and accuracy of the information actually included.

11. On "product under consideration," Canada rests its argument primarily on Article 2.6 of the AD Agreement. Yet, Article 2.6 contains no obligation at all on how an investigating authority is to define the product under consideration in an investigation. That understanding of Article 2.6 is reflected in the diverse practices of many WTO Members, including Canada itself.

12. Under Article 2.6, the existence of a "product under consideration" is taken as a given. No matter how an investigating authority defines the product under consideration, that becomes the basis for determining whether other products are "like products."

13. 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 argue that "like product" constrains how an investigating authority defines the product under consideration.

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<sup>6</sup> 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.

<sup>7</sup> See United States first written submission, paras. 50-62.

14. 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.

15. 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.<sup>8</sup>

16. 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.

17. On the question of calculation of the overall dumping margin for a given producer, 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. 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.

18. 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. 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."

19. 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."

20. Canada relies heavily on the Appellate Body Report in *EC-Bed Linen*.<sup>9</sup> While that report dealt with the calculation of the overall dumping margin by the EC, the report is not an

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<sup>8</sup> 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.

<sup>9</sup> 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.

interpretation of the AD Agreement with any broader applicability. 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 submission.

21. Canada makes a number of company-specific claims. 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. What Canada seeks is to have this Panel re-weigh the evidence.

### **Closing Statement**

22. Canada's acknowledgment that facts are always relevant in considering the issues presented underscores that this Panel is not considering questions in the abstract but in a particular factual context.

23. On our requests for preliminary rulings, we noted with interest Canada's statement that it will be submitting a seven page expert's memorandum explaining the methodology applied to create Exhibit CDA-77. The very fact that Canada's expert requires seven pages to explain the methodology underscores our point that the Exhibit is new evidence.

24. There has been some discussion of standard of review. Contrary to Canada's assertion, the United States does not advocate "total deference." 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 of the AD Agreement.

25. On 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 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.

26. 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.

27. Also on initiation, discussion before the Panel 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.

28. 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.

29. With respect to product under consideration, 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.

30. 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.”<sup>10</sup> In telling the Panel where to draw the line, Canada is improperly urging the Panel to find facts as if it were the investigating authority.

31. 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].” However, the absurd circumstances that Canada hypothesizes simply are not at issue here.

32. Regarding Canada’s claim for an adjustment for differences in dimension, Canada has made several misleading and unsubstantiated assertions. For example, Canada's 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.” However, Commerce took dimension into account by accepting dimension in its model match methodology.

33. Similarly, Canada argues that all the parties, including the U.S. petitioners, asserted that dimension affected price,<sup>11</sup> but cites to no record evidence of this. The parties did not express a common view. 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.”<sup>12</sup>

34. 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. However, Commerce’s matching criteria do not dictate what price adjustment it must make. Canada confuses two separate decisions made by Commerce. The product matching decision is made early in the investigation, before facts relevant to price comparability are gathered and evaluated.

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<sup>10</sup> Canada’s oral statement at the first meeting of the Panel, paras. 34 and 35 (June 17, 2003).

<sup>11</sup> *Id.*, at para. 54.

<sup>12</sup> *Id.*, at para. 59.