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United States - Final Dumping Determination on Softwood Lumber from Canada

(AB-2004-02)

Opening Statement of the United States

June 22, 2004

1. Members of the Division, good morning. We are pleased to have this opportunity to present the views of the United States. We will focus our comments on several keys points in this appeal, highlighting certain areas where we believe the Panel and/or Canada has erred in its analysis or argumentation.

The United States' Appeal on Offsets

2. Given that the parties cannot even agree on how to characterize the issue in dispute, we thought we would start there.

3. Canada accuses the United States of basing its argument on terms not found in the AD Agreement, such as "negative dumping," "negative margins," and "offsets." The United States agrees that these terms do not exist in the AD Agreement. However, it is Canada's "zeroing" theory that depends on the concepts these terms convey. Their absence from the AD Agreement only emphasizes the flaws in Canada's argument.

The Methodology

4. It is useful to review briefly the U.S. methodology, so that we can be clear about why we have these differences in terminology and where those differences arise.

5. In the underlying investigation, the "product under consideration" was softwood lumber. This product consisted of many different "types," with many different physical characteristics,

sold at different levels of trade, and pursuant to different terms and conditions of sale. Each of the Canadian companies that was individually examined also made home market sales of softwood lumber (the "like product"), consisting of an equally diverse set of "types," with differing physical characteristics, sold at different levels of trade, and pursuant to varying terms and conditions of sale. Thus, the investigation covered a range of transactions, including sales as diverse as 2x4's to builders and cedar decking to distributors.

6. In order to make a fair comparison between export price and normal value, the United States distinguished sales at distinct levels of trade and, within each level of trade, identified distinct types, or models, of softwood lumber, based on their physical characteristics. For each of these subsets of export transactions, the United States identified a corresponding subset of identical home market transactions, i.e., the same type of lumber sold at the same level of trade. If there were no sales of the identical type of softwood lumber in the home market, the United States identified the most similar home market transactions and, to the extent that the differences were demonstrated to affect price comparability, made due allowance for the differences between the home market and export transactions. In this way, the United States ensured that the margins it calculated were based on comparable transactions.

7. These subsets of comparable transactions, in each market, were separately weight-averaged and *the weighted average of the normal values* for each subset was compared to the *weighted average of all export prices in the comparable subset.*

8. Significantly, up through this point in the methodology, the United States and Canada essentially agree on the WTO consistency of this methodology. We both agree on the relevant facts up to this point. We both agree that the United States made comparisons between

comparable subsets of export and normal value transactions based on distinctions in level of trade and physical characteristics. Additionally, we both agree that when these comparisons were made, *all* comparable transactions were included in the subsets.

9. If we pause here, for just a moment, and turn to Article 2.4.2 of the AD Agreement, you will notice that the process we just described corresponds to the language of that provision:

> Subject to the provisions governing fair comparison in [Article 2.4], the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions...

The similarities between the text of the AD Agreement and the U.S. methodology are not the result of substituting terms or mischaracterizing either the Agreement or the U.S. methodology as Canada would have you believe. They are the result of the correct application of Article 2.4.2. in the U.S. methodology. And again, Canada, from what we can tell, agrees with the WTO-consistency of the U.S. methodology so far.

10. But, the agreement ends here. In fact, the disagreement starts with the results of the comparisons between the weighted average normal values and the weighted average export prices. Canada asserts, incorrectly, that a "margin of dumping" can exist only for the product under consideration as a whole and that the results of the individual comparisons are not margins of dumping. That assertion ignores the text of Article 2.4.2. As the Panel found, and Canada conceded, Article 2.4.2 permits multiple comparisons between normal value and export price, either on an average-to-average or transaction-to-transaction basis. "Margins of dumping" is the term used in Article 2.4.2 to describe the results of those multiple comparisons when the normal

value is greater than the export price. If the normal value is less than or equal to the export price, that comparison did not involve dumping and there is no margin of dumping for that comparison.

11. The United States detailed the remaining steps of its methodology in its submissions to the Panel.[1] Pursuant to the U.S. methodology, comparisons for which the normal value was less than the export price – in other words, the non-dumped comparisons – are not ignored. Even though those export transactions were not dumped, their full value was included in the total value of all export transactions used to calculate the antidumping duty rate for the product under consideration. In other words, non-dumped comparisons are factored into the calculation of the overall dumping margin, and the more non-dumped comparisons there are, the lower the overall dumping margin will be.

Differences

12. Now, to be very clear about where the differences between the United States and Canada occur and why we don't agree on the characterization of the issue: the differences arise not with respect to how the comparisons are made, but with respect to how the results of those comparisons are interpreted. Canada claims that the United States failed to recognize the extent to which export price exceeds normal value on some comparisons. The question is: where in the AD Agreement is such an obligation found? Both Article 2.1 of the AD Agreement and Article VI(1) of GATT 1994 define dumping as existing when the export price is *less* than normal value. Conversely, when export price is *greater* than normal value, there is an absence of dumping. Canada's argument would require the Appellate Body to read into the AD Agreement the concept

[1]United States Answers to Panel's 13 August 2003 Questions, August 26, 2003, paras. 52-56.

of "negative dumping." In Canada's view, when export price is greater than normal value, the result is not merely "no dumping;" it is "negative dumping," or a "negative margin," or a "margin of non-dumping." Whatever Canada would prefer to call it, Canada points to no evidence that the AD Agreement recognizes anything other than the presence or absence of dumping.

13. An illustration highlights the problem with Canada's position. Assume that there is an antidumping investigation on large power transformers and, during the investigation period, there is one export transaction. If that export transaction is dumped, assuming that injury also is found, there is no dispute that the authorities may impose an anti-dumping measure on large power transformers based on the difference between the export price and the normal value for that transaction.

14. Now, assume that there are two export transactions. The first is the dumped one we just mentioned. The second involves a different type of large power transformer, sold to a different customer, at a different level of trade, and with a different normal value. This second transaction is not dumped: in fact, the export price exceeds the normal value.

15. Indeed, this is the issue before you: whether the only permissible interpretation of the AD Agreement is that a Member must reduce the amount of dumping found on the first transaction based on the second transaction – involving a different type or model, sold at a different level of trade.

16. To put it yet another way, Canada is asking the Appellate Body to find that if a company sells at above normal value to, let's say, the *distributor* level of trade, these sales somehow offset or alleviate the dumping, and the injury associated with the dumping, that is occurring at the

retail level of trade. Our argument is that there is no offset obligation in the Agreement and that, in the absence of such an obligation, reducing the margin of dumping found at the retail level of trade based on the results found at the distributor level of trade nullifies the distinctions between these levels of trade.

17. You will recall that the United States provided a chart in its Appellant's Submission and used that chart to illustrate various arguments at issue in this appeal. Canada has taken issue with the chart, in particular, criticizing its simplicity. We agree that the chart was simple – precisely to illustrate and isolate the implications of the various arguments about "zeroing." On the other hand, Canada's alternative illustration is one in which the *relative volumes* of different transactions in the home market can have a disproportionate effect on the dumping margin calculation, completely distinct from, and potentially masking, any effects of "zeroing."

18. In sum, while GATT 1994 Article VI(1) says that dumping is to be condemned, nowhere does it, or the AD Agreement, mitigate this condemnation, or say that the dumping margin should be lowered based on the extent of above-normal-value sales on non-comparable transactions. Simply put, Canada's argument has no basis in the AD Agreement or in any other WTO agreement.

Historical Circumstances

19. The historical circumstances in which the AD Agreement was concluded further support the United States' argument that Canada's position has no legal basis in the AD Agreement. The negotiators were aware of established practices of major users of the antidumping instrument under the GATT 1947 and the Tokyo Round Antidumping Code. That practice included both the "asymmetry" aspect of comparisons (comparing weighted averages to individual transactions)

and the so-called "zeroing " issue (not granting an offset for non-dumped comparisons when combining the results of multiple comparisons). The negotiators reached agreement to eliminate the "asymmetrical" comparisons in investigations, except in certain instances. This agreement is reflected in Article 2.4.2. Furthermore, the negotiators did not reach agreement to make any changes regarding how Members aggregated the results of multiple comparisons.

20. Neither the Panel nor Canada has provided any meaningful rebuttal to the historical context confirming the United States' construction of the AD Agreement. Their responses, instead, involve: (1) explicitly ignoring the historical circumstances (despite the interpretive guidance in Article 32 of the Vienna Convention on the Law of Treaties)[2]; (2) asserting that if the negotiators had intended *not* to address aggregation, they "would have made this clear" in the AD Agreement (even though the Antidumping *Code* similarly contained no such provision)[3]; and (3) asserting, without any textual support, that the words of Article 2.4.2 regarding average-to-average comparisons – "the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions" – "are neither equivocal nor inconclusive" in requiring Members to offset dumped comparisons with non-dumped comparisons.[4] Such responses, particularly assertions as to what the negotiators would have done to make explicit either their lack of agreement on an offset requirement or their agreement

[2]Canada's Appellee Submission, paras. 27-28; Lumber Panel Report, para. 7.223.

[3]Canada's Appellee Submission, para. 41; Lumber Panel Report, para. 7.216.

[4]Canada's Appellee Submission, para. 44; Lumber Panel Report, para. 7.223.

not to create new obligations with respect to offsets, are simply not credible given that they are not supported by the text or the negotiating history. Furthermore, the credibility of Canada's dismissal of historical circumstances and of the U.S. arguments in this dispute is diminished by Canada's own long-standing use of the very methodology about which it complains. Even now, Canada continues to use this methodology. That fact contradicts Canada's argument with respect to the use of historical circumstances.

21. Perhaps the clearest articulation of our disagreement with Canada can be found in paragraph 10 of Canada's Appellee's Submission. There, Canada states "The methodologies set out in [Article 2.4.2] prescribe the manner in which investigating authorities determine an overall margin of dumping for the product under consideration."

22. This statement is wrong for two reasons. First, the "margins [plural] of dumping" referred to in Article 2.4.2 refer to the results of the comparisons between normal value and the comparable export price. It is not merely a reference to multiple exporters or producers. In fact, the term "margins of dumping" is also used in Article 2.4.2 to describe the results of transaction-to-transaction comparisons – providing contextual support for the United States' interpretation. Where there is more than one export transaction, there will be more than one comparison. Multiple comparisons may, by definition, yield multiple margins.

23. The second error in Canada's statement relates to its reference to the "product under consideration." Article 2.4.2 only speaks to determining the existence of margins of dumping based on comparisons of transactions, either individually or in groupings of comparable transactions. It does not speak to the issue of dumping with respect to the product under consideration as a whole.

EC – Bed Linen

24. The United States does recognize that the Appellate Body addressed the EC's so-called zeroing methodology in *EC – Bed Linen* and that the conclusion urged by the United States in this case differs from the result in *EC – Bed Linen*. Nevertheless, the United States believes that a different result is warranted for all the reasons we discussed in our submission.

25. Canada's main response to these arguments was that *EC – Bed Linen* created "legitimate expectations" among the Members as to how the AD Agreement would be interpreted. Notably, such "legitimate expectations" have not caused Canada to change its own practice. In any event, whatever expectations dispute settlement may create, those expectations do not amount to additional rights for WTO Members, they are not authoritative interpretations of the WTO agreements, and they do not substitute for the proper analysis of particular arguments of particular parties in a particular dispute. The Appellate Body itself, in discussing "legitimate expectations" in *Japan – Alcoholic Beverages II*, only went so far as to say that the legitimate expectations "should be taken into account where they are relevant to any dispute."[5]

26. The relevance of the *EC – Bed Linen* report is limited in that certain legal arguments and textual analysis were simply not addressed in that report. Canada, rather than attempting to reconcile the Lumber Panel report with *EC – Bed Linen*, denies the differences, ignoring completely the statement in *EC – Bed Linen* that "nothing in Article 2.4.2 or in any other provision of the Anti-Dumping Agreement [...] provides for the establishment of 'the existence

[5]Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, at 14.

of margins of dumping' for types or models of the product under investigation."[6] Recognizing that comparisons between export price and normal value are properly made on a model and level of trade specific basis, and recognizing that the results of such comparisons may be margins of dumping, together provide meaning to all the terms of the provision.

Canada's Cross-Appeal

27. Finally, with respect to Canada's appeal of the Panel's findings regarding two company-specific issues, we will simply note that Canada has failed to present proper issues for review by the Appellate Body. On both issues, Canada mischaracterizes the Panel's findings in an attempt to create issues of law or legal interpretation that simply do not exist. Both matters were factual matters that were properly resolved by the Panel.

Conclusion

28. Once again, we appreciate this opportunity to present to you our views on the issues on appeal. In the interest of time, we have not addressed all of Canada's arguments in this opening statement. Therefore, we would welcome the opportunity to address more fully any arguments Canada has made and answer any questions the Division may have. Thank you.

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[6] *AB Report, EC – Bed Linen*, para. 53.