United States - Final Dumping Determination on Softwood Lumber from Canada

WT/DS264

Closing Statement of the United States
Second Meeting of the Panel

August 12, 2003

1. Mr. Chairman and members of the Panel, we first would like to thank you for the time and effort you have devoted to this case. The issues in this dispute are varied and complex. Your questions reflect a close and careful reading of the submissions. For this, we are very grateful.

2. By way of closing, rather than review our arguments on each of the issues in dispute, we will elaborate on just a few points.

3. Preliminarily, we want to make clear the U.S. position on the recommendation Canada is asking the Panel to make. At the conclusion of both its first and second submissions, Canada went beyond asking the Panel to recommend that the United States bring its measure into conformity with WTO obligations. It specifically asked the Panel to recommend that the United States revoke the anti-dumping duty order and return all cash deposits collected.[1] The United States would note that Canada's request that the Panel recommend a particular course of action is inconsistent with the DSU.

4. Article 19.1 of the DSU provides: "Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement." This facilitates the goal of encouraging parties to reach mutually satisfactory solutions. It also recognizes that a Member generally has many options available to it to bring a measure into compliance.

5. Article 19.1 of the DSU also provides: "In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations." Canada apparently is seeking a suggestion rather than a recommendation. In *United States–Hot-Rolled Steel*, the panel explained the differences between a recommendation and a suggestion, and the panel rejected a request by Japan similar to Canada's request in this case.[2] Since the U.S. measures at issue already conform to the WTO agreements, there is no need for either a recommendation or a suggestion. However, the United States would also note that even under Canada's claims and arguments in this dispute, Canada's request for a suggestion

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[1]Canada First Written Submission, para. 280; Canada Second Written Submission, para. 346.

[2]Panel Report, *United States–Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, adopted Aug. 23, 2001, paras. 8.5-8.14.

would go beyond anything relevant to implementing a recommendation and instead seeks action nowhere called for under the WTO. Canada's request simply has no basis under the DSU.

6. I will turn now to a few general observations in closing. At this stage in the proceeding, it is appropriate to step back and consider the big picture. In doing so, we are struck by what we see as inconsistent argumentation by Canada on several of its main claims. That is, we see a pattern, in which Canada initially takes one position, then alters that position following U.S. responses demonstrating the flaws in the initial position. This is particularly noticeable when it comes to initiation, product under consideration, and calculation of an overall dumping margin.

7. On the issue of initiation, for example, in its first submission, Canada focussed on the absence of the Weldwood data, and its critique of the price and cost data in the application was limited to a single paragraph.[3] The United States responded to Canada's Weldwood argument, demonstrating the irrelevance of that data to the initiation decision.[4] In its responses to questions and in its rebuttal submission, Canada chose to highlight the price and cost data, challenging specific price quotes, the representativeness of factor values from U.S. mills, freight values, and the time period during which costs were assessed.[5] The United States fully refuted these objections in its second submission.[6] Now, Canada's approach at this second Panel meeting has been to invoke new objections to how costs were allocated among the U.S. mills from which usage factors were identified.[7] The United States addressed these points in its second submission.[8] Ultimately, Canada misses the main point, which is that Commerce's decision to initiate was based on a proper establishment of the facts and an unbiased and objective evaluation of those facts.

8. On product under consideration, Canada's panel request objected to Commerce's finding of a "single like product . . . rather than several distinct like products. . . ."[9] In its first submission, Canada switched its focus of its complaint to the term "product under consideration" in Article 2.6 of the AD Agreement.[10] In response to the U.S. request for a preliminary ruling rejecting Canada's expansion of its claim, Canada stated that "the legal basis for its claim remains Article 2.6."[11] The United States demonstrated that Article 2.6 does not instruct

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[3] Canada First Written Submission, para. 104.

[4] U.S. First Written Submission, paras. 65-76.

[5] *See, e.g.,* Canada Responses to Panel Questions, paras. 17-44

[6] *See* U.S. Second Written Submission, paras. 16-32.

[7] *See* Canada's Opening Statement at Second Panel Meeting, para. 19.

[8] *See* U.S. Second Written Submission, paras. 27-28.

[9] *See* Canada Panel Request, para. 2.

[10] *See* Canada First Written Submission, paras. 114-116.

[11] Canada's Response to Preliminary Objections, para. 16.

investigating authorities on how to define the product under consideration.[12] In its second submission and at this second panel meeting, Canada has turned its focus back to the defined term "like product."[13] It now purports to "infer" from the definition of "like product" a limitation on the definition of "product under consideration."[14] We have demonstrated that Article 2.6 supports no such inference, let alone the express limitation Canada has identified. Indeed, Canada's interpretation turns Article 2.6 on its head.

9. On calculation of an overall dumping margin, Canada began, in its first submission, with heavy reliance on the Appellate Body Report in *EC–Bed Linen*.[15] It then deviated from that course, making arguments that suggest disagreement with the *EC--Bed Linen* reasoning. For example, the Appellate Body in *EC--Bed Linen* dismissed the notion that Article 2.4.2 envisages two stages in establishment of an overall margin.[16] However, in its responses to the Panel's questions and in its rebuttal submission, Canada acknowledged the appropriateness of a two-stage process.[17] But, it made the implausible suggestion that "all" and "comparable" mean different things at each stage. Yesterday, Canada's oral statement and its responses to the Panel's questions left open the question of its position as to what Article 2.4.2 addresses. Indeed, Canada admitted to having used "loose language" in describing its position. When it was drawn to Canada's attention that Article 2.4.2 makes reference to transaction-to-transaction comparisons, Canada replied that it was focusing on the weighted-average-to-weighted-average provision in Article 2.4.2. But, Article 2.4.2 must be read in its entirety; an interpretation that takes individual phrases in isolation should be rejected.

10. What each of these illustrations demonstrates is claims built on a less-than-solid foundation. The inconsistency in Canada's argumentation is telling, because Canada appears to have brought this case without knowing whether and how the United States violated its WTO obligations. This should give the Panel pause. For the reasons set forth in our submissions and statements, applying the Article 17.6 standard of review, the Panel should find Commerce's initiation and conduct of the lumber investigation to have been consistent with WTO obligations.

11. Again, we thank you, Mr. Chairman and members of the Panel, for your attention and for your thoughtful consideration of the issues in this dispute.

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[12] *See* U.S. First Written Submission, paras. 85-99.

[13] *See* Canada Second Written Submission, paras. 64-84; Canada Opening Statement at Second Panel Meeting, paras. 39-40.

[14] Canada Second Written Submission, para. 70.

[15] *See* Canada First Written Submission, paras. 165-173.

[16] Appellate Body Report, *EC–Bed Linen*, para. 53.

[17] *See* Canada First Responses to Panel Questions, paras. 101, 105-107, 109; Canada Second Written Submission, paras. 150-151.