UNITED STATES - FINAL DUMPING DETERMINATION ON SOFTWOOD LUMBER FROM CANADA

Recourse to Article 21.5 of the DSU by Canada

(WT/DS264)

EXECUTIVE SUMMARY OF REBUTTAL SUBMISSION OF THE UNITED STATES

August 1, 2005

I. Introduction

1. In its rebuttal submission, the United States focuses on two aspects of the applicable text that further confirm that Canada's claims have no merit. First, the United States demonstrates that Canada's proffered interpretation of the fair comparison requirement in Article 2.4 of the AD Agreement does not withstand scrutiny under the customary rules of treaty interpretation. It yields an anomaly that must cause it to be rejected under those rules. Second, the United States analyzes the term "margin of dumping" in light of its context, demonstrating that the term may refer to the result of a transaction-to-transaction comparison even if, in certain circumstances, it also may refer to a single, overall "margin of dumping" for an exporter or producer.

2. Canada substitutes for treaty text a reliance on *obiter dicta*, passing statements in footnotes, and conclusions unsupported by reasoning. These all fail to demonstrate that the measure taken by the United States to comply with the recommendations and rulings of the Dispute Settlement Body ("DSB") is not based on a permissible interpretation of the AD Agreement. As the measure taken to comply is, in fact, based on a permissible interpretation of the AD Agreement, it must be upheld under the applicable standard of review in Article 17.6(ii) of that agreement.

II. The Approach of the United States to Investigating Whether Dumping Exists Is Consistent With Article 2.4 of the AD Agreement, Which Contains No Obligation With Respect to "Zeroing"

3. The AD Agreement contains no general obligation to offset dumping with transactions that exceed normal value. The Appellate Body has found such an obligation to exist only in one circumstance: determining whether dumping exists in the investigation phase when using the average-to-average methodology. The basis for that finding is the particular text in Article 2.4.2 providing for that circumstance. In this regard, the Appellate Body in the underlying proceeding specifically recognized that the issue before it was whether so-called "zeroing" was prohibited under the average-to-average methodology found in Article 2.4.2. The basis for its finding was the obligation in Article 2.4.2 that "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* . . . ." (AB Report, paras. 82, 86, 98.)

4. The Appellate Body did not base its findings on an interpretation of the obligation to make a "fair comparison" of export price and normal value as set forth in Article 2.4. The obligation to make a "fair comparison" under Article 2.4 addresses the appropriate adjustments that an investigating authority must make for differences between export price and normal value that are demonstrated to affect price comparability.

5. Indeed, reading the Article 2.4 obligation to make a "fair comparison" as requiring an offset to dumping for transactions that exceed normal value in all situations would be at odds with the approach advocated by the Appellate Body, namely that an "interpretation must give meaning and effect to all the terms of a treaty." "An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility." (*US*

– *Gasoline (AB)*, p. 23.)

6. Specifically, an interpretation that Article 2.4 imposes such an offset obligation would render meaningless the targeted dumping methodology set forth in Article 2.4.2. A general obligation to provide for an offset to dumping for sales exceeding normal value would mean that an investigating authority must, mathematically, realize the same result, regardless of whether it uses the average-to-average methodology in the investigation phase, as set forth in the first sentence of Article 2.4.2, or the average-to-transaction methodology, as set forth in the targeted dumping provision of Article 2.4.2. Such an interpretation would reduce the targeted dumping clause to inutility.

7. Although the targeted dumping methodology is not itself at issue in this dispute, the implications for that methodology of the general Article 2.4 requirement that Canada posits demonstrate the fallacy of Canada's claim. These implications confirm that the general Article 2.4 requirement that Canada posits cannot exist. As Canada's claim that the fair comparison obligation requires offsetting with respect to the transaction-to-transaction methodology rests on the premise that the fair comparison obligation requires offsetting generally, that claim must fail.

A. The "Fair Comparison" Obligation in Article 2.4 Refers to the Adjustments Necessary to Account for Differences in Export Price and Normal Value That Are Demonstrated to Affect Price Comparability

8. Canada asserts that when the United States, using transaction-to-transaction comparisons, does not reduce the amount of dumping found based on export transactions sold at above normal value, it has failed to make a "fair comparison" pursuant to Article 2.4. There are two principal flaws with the suggestion that Article 2.4 contains a general offset requirement. First, such a requirement would pertain to steps an investigating authority takes *after* making a comparison between export price and normal value, whereas Article 2.4 plainly addresses only adjustments that must be made *before* a comparison is performed. Second, such a requirement would impermissibly render part of Article 2.4.2 superfluous.

9. Article 2.4 of the AD Agreement provides:

> A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability. In the cases referred to in paragraph 3 of Article 2, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits

> accruing, should also be made. If in these cases, price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or make due allowance as warranted under this paragraph. The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.

10. Article 2.4 thus plainly establishes the obligation that a fair comparison be made between normal value and export price and provides detailed guidance as to how that fair comparison is to be made. Article 2.4 recognizes that the normal value and export transactions to be compared may occur, *inter alia*, (a) with respect to models with differing physical characteristics, (b) at distinct levels of trade, (c) pursuant to different terms and conditions, and (d) in varying quantities.

11. The focus of Article 2.4 is on how an investigating authority is to select transactions for comparison and make the appropriate adjustments for differences that are demonstrated to affect price comparability. The article does *not* address steps that an investigating authority may take *after* a comparison is made. As the panel in *Egypt – Rebar* explained, "[A]rticle 2.4 in its entirety, including its burden of proof requirement, has to do with ensuring a fair comparison, through various adjustments as appropriate, of export price and normal value." (Para. 7.335).

12. Every Appellate Body and panel report that has turned on the question of price comparability has interpreted Article 2.4 to address *pre*-comparison price adjustments for differences that are demonstrated to affect the comparability of prices between markets. Thus, the original panel in the underlying proceeding summarized the scope of Article 2.4, finding:

> An examination of a request for an Article 2.4 adjustment should therefore start with a determination of whether a difference between the export price and the normal value exists. That is, a difference between the price at which the like product is sold in the domestic market of the exporting country and that at which the allegedly dumped product is sold in the importing country. *Ultimately, this provision requires that differences exist between two markets. If there is no difference affecting the products sold in the markets* concerned, for instance, where the packaging of the allegedly dumped product and that of the like product sold in the domestic market of the exporting country is identical, in our view, *an adjustment would not be required to be made by that provision.*

(Panel Report, para. 7.356 (emphasis added).)

13. Similarly, as the Appellate Body stated in *US – Hot-Rolled Steel*, "[A]n examination of whether USDOC acted consistently with Article 2.4 of the Anti-Dumping Agreement must focus on . . . whether there were 'differences', relevant under Article 2.4, which affected the

comparability of export price and normal value." (Para. 179.)

14. Canada's view appears to be that to comply with the fair comparison requirement in Article 2.4, the United States had to apply the result of one comparison (not involving dumping) as an offset to the result of another comparison (involving dumping). In other words, Canada's view seems to be that the fair comparison requirement is a requirement to adjust the results of one comparison in light of the results of a distinct comparison. However, Article 2.4 is quite clear in requiring adjustments for differences that are demonstrated to affect price comparability and in delineating illustrations of such differences. Canada has not shown – and, logically, cannot show – that the result of a comparison between two particular transactions is a difference affecting the price comparability of two completely different transactions.

15. As Article 2.4 contains no general obligation to make an adjustment to the result of one transaction-to-transaction comparison in light of the result of another transaction-to-transaction comparison, the United States did not breach any obligation under Article 2.4 by declining to make such an adjustment.

B. Canada's Interpretation of Article 2.4 Would Render Part of Article 2.4.2 Superfluous

16. Canada's suggestion that the "fair comparison" requirement in Article 2.4 contains a general obligation to offset dumping margins also cannot be reconciled with Article 2.4.2. This interpretive problem results from application of the general offset obligation that Canada posits to the targeted dumping methodology provided for in Article 2.4.2. Under Canada's interpretation of Article 2.4, the targeted dumping methodology would become redundant with the average-to-average methodology. Reference to a distinct targeted dumping methodology in Article 2.4.2 thus would be superfluous. That unavoidable result undermines Canada's proposed interpretation.

17. The targeted dumping methodology provided for in Article 2.4.2 mathematically must yield the same result as an average-to-average comparison if, in both cases, non-dumped comparisons are required to offset dumped comparisons. In this respect, an offset requirement (or "non-zeroing" requirement) based on the "fair comparison" requirement of Article 2.4 would render the targeted dumping exception in Article 2.4.2 a nullity.

18. The "targeted dumping" methodology is an exception to the obligation to engage in a symmetrical comparison in an investigation. By the terms of Article 2.4.2, it may be used "if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods . . . ." When the investigating authority provides an explanation as to why these "differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison," it may then use the asymmetrical average-to-transaction comparison to establish the existence of margins of

dumping during the investigation phase.

19. The targeted dumping methodology is not an exception to the fair comparison requirement of Article 2.4. It is an exception only to the symmetrical comparison requirements for investigations set forth in the first sentence of Article 2.4.2. Article 2.4, on the other hand, applies to all comparison methodologies. Canada argues that "zeroing" violates the fair comparison obligations of Article 2.4. However, if Canada were correct, then the fair comparison obligation would require the investigating authority to provide for an offset for transactions that exceed normal value even when using the targeted dumping methodology. In fact, in the underlying proceeding before the Appellate Body, Canada conceded that "zeroing is permitted under the third methodology [*i.e.*, the targeted dumping methodology]." (AB Report, para. 105 n.164.) However, Canada did not offer then, and does not offer now, any textual basis for a distinction between the fair comparison requirement as applied to the targeted dumping methodology and the fair comparison requirement as applied to the other two methodologies provided for in Article 2.4.2.

20. If offsetting were required, the overall dumping margin calculated for an exporter must, mathematically, be the same under both a symmetrical comparison of weighted averages of normal values and export prices and an asymmetrical comparison of weighted average normal values and individual export prices. The reason for this is that, if offsetting were required, then all non-dumped sales (*i.e.*, negative values) would offset the margins on all dumped sales (*i.e.*, positive values). It makes no difference mathematically whether the calculations are based on comparing weighted-average normal values to weighted-averages of all comparable export transactions or on comparing weighted-average normal values to transaction-specific export prices. In both cases, the sum total of the positive values will be offset by the sum total of the negative values, and the results will be the same.

21. An interpretation of Article 2.4 of the AD Agreement that requires such offsets in general would render the distinctions between the average-to-average and the average-to-transaction methodologies in Article 2.4.2 a nullity. A panel should not interpret the AD Agreement in such a way that its express provisions are rendered meaningless or superfluous. The Appellate Body has consistently found that "interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility." (*US – Gasoline (AB)*, p. 23.)

22. The "general obligation" that Canada posits cannot exist, because if it existed it would nullify any distinction between the average-to-average and the average-to-transaction methodologies in Article 2.4.2. As the posited obligation cannot exist with respect to the average-to-transaction methodology, it cannot exist at all, for there is no textual basis for any distinction between the fair comparison requirement as applicable to the average-to-transaction methodology and the fair comparison requirement as applicable to the transaction-to-transaction methodology. Canada has asserted no such distinction and, in fact, refers to the asserted

requirement at issue as a "general obligation." As the Article 2.4 "general obligation" that Canada posits does not and cannot exist, Canada's claim that the measure taken to comply is inconsistent with Article 2.4 must be rejected.

III. Article 2.4.2 Does Not Require Calculation of One Margin of Dumping for the "Product As A Whole" When Using the Transaction-to-Transaction Comparison Methodology

23. Having demonstrated that the fair comparison obligation in Article 2.4 is not an obligation to provide for offsets, the United States now turns to Canada's argument that "margins of dumping" can be found only for the "product as a whole." Canada's argument, in effect, is that the reasoning of the Appellate Body in the underlying proceeding, concerning the meaning of the term "margins of dumping" in the context of the average-to-average methodology, is equally applicable here, in the context of the transaction-to-transaction methodology. That is, Canada argues that, regardless of context, "margins of dumping" always means margins of dumping for the "product as a whole." Canada's argument is fatally flawed, because it ignores the ordinary meaning of "margin of dumping" in light of relevant context, including Article VI of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"). From the ordinary meaning of that term read in light of relevant context, it is clear that a particular transaction-to-transaction comparison itself may yield a margin of dumping. Moreover, the AD Agreement imposes no obligation whatsoever with respect to transaction-to-transaction comparisons that do *not* yield margins of dumping. In particular, it imposes no obligation to apply the results of those comparisons as offsets to comparisons that do yield margins of dumping.

A. Article 2.4.2 Addresses Only the Methodologies Available to Determine the Existence of Dumping, Not The Aggregation of Multiple Transaction-to-Transaction Comparisons

24. Article 2.4.2 does not contain an obligation to calculate a single margin of dumping for the product as a whole when the transaction-to-transaction comparison methodology is used. Article 2.4.2 provides three methodologies for comparing export prices to normal values in an investigation: (1) weighted-average-to-weighted-average comparisons; (2) transaction-to-transaction comparisons; and, (3) under certain circumstances, weighted-average-to-transaction comparisons. In most circumstances, the second and third methodologies will result in multiple comparisons, because neither is limited to the rare circumstance of investigations involving only one export transaction. Under these methodologies, each export transaction will result in a separate comparison.

25. Article 2.4.2 simply does not address the issue of aggregating the results of multiple comparisons under the transaction-to-transaction methodology. While this methodology will, in most cases, lead to multiple comparisons between export transactions and normal values, Article

2.4.2 does not provide any guidance as to how the results of those comparisons are to be aggregated to determine a single overall margin. In fact, Article 2.4.2 itself does not require that the results of those multiple comparisons be aggregated at all.

B. Consistent With Article VI:2 of the GATT 1994, Article 2.4.2 of the AD Agreement Envisions the Establishment of Multiple Transaction-to-Transaction Margins of Dumping

26. The question framed by Canada's argument is, "What is a 'margin of dumping' in the context of the transaction-to-transaction methodology provided for in Article 2.4.2 of the AD Agreement?" For the answer to that question, it is appropriate to begin with Article VI of the GATT 1994, which provides the relevant definition of the term.

27. Paragraph 2 of Article VI provides that "[f]or the purposes of this Article, the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1." When read with the provisions of paragraph 1, the "margin of dumping" is the price difference between export price and normal value when a product has been "introduced into the commerce of an importing country at less than its normal value," *i.e.,* the difference between export price and normal value when the product has been dumped.

28. For present purposes, the key term in Article VI:2 is "price." A price is a transaction-specific fact. It follows that a "price difference" is the difference between two transaction-specific facts. Accordingly, through its reference to "the margin of dumping" as "the price difference determined in accordance with the provisions of paragraph 1," Article VI:2 plainly envisions a margin of dumping being established with respect to individual transactions.

29. The fact that a margin of dumping within the meaning of Article VI:2 may be found with respect to transaction-specific comparisons is further confirmed by the text of the first paragraph of Ad Article VI, Paragraph 1 of the GATT 1994, which uses the term "margin of dumping" in a manner that cannot reasonably be interpreted as requiring a single result for the "product as a whole." Thus, Ad Article VI:1(1) provides:

> Hidden dumping by associated houses (that is, the sale by an importer at a price below that corresponding to the price invoiced by the exporter with whom the importer is associated, and also below the price in the exporting country) constitutes a form of price dumping with respect to which the margin of dumping may be calculated on the basis of the price at which the goods are resold by the importer.

30. This provision expressly refers to a particular type of export transaction. In such a circumstance, the margin of dumping may be calculated based on the price charged by the importer. Of course, exports of the product at issue may be sold through a variety of different

channels. Some sales may be made to importers unrelated to the seller, and others may be made to "associated houses." The fact that Ad Article VI:1(1) contemplates a margin of dumping being calculated with respect to "the price at which the goods are resold by the importer" in the case of "associated houses" demonstrates that under Article VI a "margin of dumping" may refer to a transaction-specific margin and need not refer, in all contexts, to a margin for a "product as a whole."

31. This interpretation of "margin of dumping" in Article VI is also consistent with the manner in which many Contracting Parties to the GATT 1947 conducted antidumping proceedings prior to the conclusion of the GATT 1994 and the AD Agreement. As is well established, prior to the conclusion of these agreements, the Contracting Parties commonly established margins of dumping based on comparisons between individual export transactions and average normal values. This practice is reflected, for example, in *US – Atlantic Salmon* (para. 483) and in *EC – Audio Tapes* (paras. 499-501). In concluding the GATT 1994 and the AD Agreement, the Contracting Parties did not amend the meaning of "margin of dumping" as used in the GATT 1947 at all, let alone in a way that would have indicated a departure from the meaning of that term as followed in their contemporaneous practice. This circumstance of the conclusion of the agreements confirms the agreed-upon meaning of "margin of dumping" in Article VI, *i.e.*, a margin of dumping may be established on a transaction-specific basis.

32. As Article VI of the GATT 1994 plainly envisions that a margin of dumping may be established on a transaction-specific basis, the AD Agreement (that is, the agreement that implements Article VI) may not be interpreted in a way that prohibits establishing a margin of dumping on a transaction-specific basis. Canada's suggestion to the contrary would require an interpretation of the AD Agreement that is inconsistent with the GATT article that the AD Agreement implements.

33. That the drafters of Article 2.4.2 of the AD Agreement understood the term "margin of dumping" to include a transaction-specific comparison, consistent with Article VI:2 of the GATT 1994, is evident from their use of the plural form – "margins of dumping." With respect to at least two of the methodologies set forth in Article 2.4.2, the transaction-to-transaction and average-to-transaction methodologies, except in the unusual situation in which there is only one export transaction, there will be multiple comparisons. Each of those comparisons will yield a price difference. To the extent that such a price difference reflects a normal value greater than export price, the price difference will be a margin of dumping within the meaning of Article VI:2 of the GATT 1994 and, by extension, within the meaning of Article 2.4.2 of the AD Agreement. Thus, with respect to the transaction-to-transaction and transaction-to-average methodologies there will ordinarily be multiple "margins of dumping."

34. This conclusion is not affected by the fact that "margins of dumping" may have a different meaning in the context of the average-to-average methodology in Article 2.4.2. There, as was found in the underlying proceeding, the term "margins of dumping" has been interpreted

"in an integrated manner" with "all comparable export transactions," such that offsets for non-dumped comparisons must be provided in order to properly establish a single margin of dumping for each exporter or producer. (AB Report, paras. 85-103). As is clear from the Appellate Body report in the underlying proceeding, this finding is a function of the particular text specific to average-to-average comparisons in Article 2.4.2 (matters not expressly addressed in Article VI:2 of the GATT 1994). Nothing in this finding changes the fact that, as expressly addressed in Article VI:2 of the GATT 1994, a price difference between two transactions, where normal value exceeds export price, is a margin of dumping.

35. Finally, that the term "margin of dumping" can refer to the results of a comparison involving a single export transaction is confirmed by Article 9.3 of the AD Agreement. Article 9.3 provides that "[t]he amount of the anti-dumping duty shall not exceed the margin of dumping . . . ." In that instance, the context for "margin of dumping" is the term "anti-dumping duty," which is a transaction-specific concept. That is, a "duty" normally is based on the particular characteristics of the import and is often calculated based on the value/price of that particular import. Thus, the antidumping duty for a specific import cannot exceed the extent to which the export price for that transaction falls below normal value (*i.e.*, the margin of dumping). The clear meaning of "margin of dumping" in Article 9.3 as a transaction-specific concept further undermines Canada's suggestion that "margin of dumping" necessarily and always refers to a margin of dumping for a "product as a whole."

36. Canada's argument that Article 2.4.2 of the AD Agreement contains a requirement that non-dumped transaction-to-transaction comparisons be applied as offsets to dumped transaction-to-transaction comparisons is predicated largely on the supposition that under the transaction-to-transaction methodology there can be only one margin of dumping for the "product as a whole." That supposition is refuted by the ordinary meaning of "margin of dumping" as used in Article VI:2 of the GATT 1994 and the AD Agreement, the context for that term, and the circumstances of the conclusion of the GATT 1994 and the AD Agreement.

C. Neither the GATT 1994 Nor the AD Agreement Recognizes "Negative Margins of Dumping"

37. Article VI of the GATT 1994 provides that the "margin of dumping" is the amount by which normal value "exceeds" export price. If normal value does not exceed export price, the result of the comparison is not a margin of dumping. Such a comparison simply is not the concern of Article VI. For its argument to succeed with respect to the transaction-to-transaction comparison methodology, Canada would need this Panel to accept that where export price exceeds normal value the result is a "negative margin of dumping," equally cognizable as a "margin of dumping" under Article VI of the GATT 1994 and the AD Agreement. However, neither Article VI of the GATT 1994 nor the AD Agreement recognizes such a concept.

38. Since Article VI of the GATT 1994 and the AD Agreement do not recognize "negative

margins of dumping," they do not require an investigating authority to take any particular steps where it finds that export price exceeds normal value in a given transaction-to-transaction comparison. The Appellate Body report in the underlying proceeding is not inconsistent with this proposition. The Appellate Body "emphasize[d] that [the terms "all comparable export transactions" and "margins of dumping"] should be interpreted in an integrated manner." (Para. 85.) Accordingly, the Appellate Body's conclusion that there was an obligation to provide offsets when using the average-to-average comparison methodology during the investigation phase was the result of its interpretation of "all comparable export transactions" together with "margins of dumping."

39. Any offsets that occur in this context reflect the use of *averages* of all export prices and normal values. That is, in applying the average-to-average methodology, the Appellate Body found that the United States was entitled to make multiple intermediate comparisons. However, in order to establish the weighted average margin of dumping for "all comparable export transactions," the Appellate Body concluded that the United States would have had to aggregate all of the results of those intermediate comparisons including those comparisons that were not dumped. The offsets, therefore, were tied to the use of the average-to-average methodology in an investigation, and did not arise out of any independent obligation to offset prices.

40. Canada has offered *no* textual analysis in support of its claim that offsetting is required when applying the transaction-to-transaction comparison methodology pursuant to Article 2.4.2. The lack of a textual basis for Canada's argument is unavoidable because the scope of the AD Agreement and the GATT 1994, with respect to the measurement of dumping, is limited to instances in which there are *positive* differences between normal value and export prices. Because there is no basis for Canada's assertion that Article 2.4.2 requires a Member, when using the transaction-to-transaction comparison methodology, to reduce the amount of dumping found based on non-dumped comparisons, Canada's claim under Article 2.4.2 should be rejected.

IV. Conclusion

41. For the reasons stated in the first submission and the rebuttal submission of the United States, Canada's challenge to the implementation by the United States of the DSB's recommendations and rulings in this dispute is groundless. The United States therefore requests that the Panel reject Canada's claims in their entirety and find that the measure the United States took to comply with the recommendations and rulings of the DSB is consistent with its obligations under the AD Agreement.