UNITED STATES – COUNTERVAILING DUTY MEASURES ON SOFTWOOD LUMBER FROM CANADA

(DS533)

CLOSING STATEMENT OF THE UNITED STATES OF AMERICA AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL

February 28, 2019

1. There has been a great deal of discussion during this meeting about "experts", and reports authored by "experts" that were submitted by Canadian interested parties during the USDOC's[1] investigation. Canada's delegate, on the first day of the hearing, suggested that it is outrageous for the United States or the USDOC to even raise concerns that the "experts" hired by the Government of Canada and Canadian provincial governments and Canadian lumber producers might be biased in favor of their clients, for whom they produced advocacy pieces, or that they would risk their reputations by putting their names on reports that present anything other than unvarnished truth – as if such pure truth exists in the field of economics or in countervailing duty law.

2. It certainly is not the intention of the United States, nor was it the intention of the USDOC, to impugn the integrity of the authors of the Canadian reports.

3. With respect, though, the U.S. Department of Commerce has plenty of experts (as you can see, a number of them are here for this meeting as part of the U.S. delegation). The experts at the USDOC include Ph.D. economists, lawyers, and government officials with decades of experience applying countervailing duty law, including substantial experience analyzing the Canadian and U.S. forestry sectors. These are dedicated public servants, and they, too, would not risk their reputations by doing anything less than working diligently, objectively, and without bias to arrive at correct conclusions that are supported by the evidence. Any suggestion to the contrary is, as Canada's delegate put it, outrageous.

4. It is critical to step back from the rather personal line of argument that Canada has advanced thus far and reflect on what this dispute truly is all about. This dispute, like all WTO disputes, is about the meaning of the covered agreements and the content of the obligations that WTO Members have accepted by joining the WTO.

5. The Panel's task in this dispute, as described in its terms of reference, is:

> To examine, <u>in the light of the relevant provisions of the covered agreements cited by the parties to the dispute</u>, the matter referred to the [Dispute Settlement Body ("DSB")] by Canada … and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements.[2]

6. Per Article 11 of the DSU,[3] the Panel is to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case <u>and the applicability of and conformity with the relevant covered agreements</u>". To assess the applicability of and conformity with the relevant covered agreements, of course, requires first understanding what obligations those agreements impose. Per Article 3.2 of the DSU, such understanding will come through the Panel's application of customary rules of interpretation of public international law, including

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[1] U.S. Department of Commerce ("USDOC").

[2] WT/DS533/3 (emphasis added).

[3] *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU").

Article 31 of the *Vienna Convention on the Law of Treaties*, which provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

7. Yet, in Canada's nearly 500-page-long first written submission, there is no discussion whatsoever of customary rules of interpretation of public international law. There is no attempt to apply customary rules to establish the meaning of the provisions of the SCM Agreement or the GATT 1994. The word "context" appears 41 times in Canada's first written submission, but not once does Canada actually attempt to do a contextual analysis of the terms of the SCM Agreement or the GATT 1994 (there actually is one instance in Canada's first written submission where the word "context" is used to refer to the kind of contextual analysis contemplated by customary rules of interpretation, but Canada is quoting a statement made by the United States in another dispute).[4] There is no discussion whatsoever in Canada's first written submission of object and purpose.

8. In short, Canada has utterly failed to assist the Panel in its task of interpreting the relevant covered agreements.

9. Instead, Canada has spent its energy re-litigating the underlying countervailing duty investigation, inviting the Panel to step into the role of the USDOC, and weigh the evidence itself, and determine for itself whether Canadian softwood lumber is subsidized. Of course, Canada has denied that it is doing this during the past few days. But Canada's first written submission and its presentations during the meeting speak for themselves. Canada focuses on the myriad details and minutia of the facts and evidence that was before the USDOC, but says nothing about the precise content of the obligations in the SCM Agreement or the GATT 1994. The analytical approach Canada proposes is an invitation to error. Respectfully, the Panel should decline that invitation.

10. The United States appreciates the time and effort the Panel and the Secretariat staff assisting you have put into preparing for this meeting, which is reflected in the questions you have asked. We look forward to responding more fully to your questions in writing. We will work hard to ensure that our written responses to those questions present clearly citations to and quotations from all of the reasoned and adequate explanation in the USDOC's determinations, and the ample evidence that supports those determinations. The United States has no doubt that the Panel will see for itself that an unbiased and objective investigating authority, looking at the same evidence that was before the USDOC, could have reached the same conclusions that the USDOC reached.

11. Madame Chairperson, members of the Panel, this concludes the U.S. closing statement. The United States once again thanks the Panel and the Secretariat staff assisting you for your hard work on this dispute, and in particular your careful attention during this meeting.

[4] *See* Canada's First Written Submission, footnote 272.