UNITED STATES – ANTI-DUMPING MEASURES APPLYING DIFFERENTIAL PRICING METHODOLOGY TO SOFTWOOD LUMBER FROM CANADA

(DS534)

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

September 13, 2018

Mr. Chairperson, members of the Panel:

1. 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 and agreed to in those agreements. Canada seeks to alter the meaning of the covered agreements by departing from the accepted rules of treaty interpretation and by inventing obligations found nowhere in the text of any covered agreement, including, *inter alia*, by reading out of the AD Agreement[1] an entire sentence.

2. As has been made plain over the past two days, the parties have a fundamental disagreement about the role of the Panel in this dispute. But that disagreement is easily resolved by consulting the text of the DSU.[2]

3. As the United States has explained, the role of any WTO dispute settlement panel established by the Dispute Settlement Body ("DSB") is to examine the matter referred to the DSB by the complaining party and to make such findings as will assist the DSB in making a recommendation to bring a measure into conformity under Article 19.1 of the DSU. [3]

4. In undertaking that examination, the DSU further specifies that a panel is to make an "objective assessment of the matter before it", including an objective assessment of "the applicability of and conformity with the covered agreements".[4] As noted in the U.S. opening statement, that objective assessment is one of conformity *with the covered agreements* – not conformity with prior reports adopted by the DSB.

5. And, finally, the DSU states that this objective assessment of the applicability of the covered agreements occurs through an interpretive analysis of the terms of the applicable covered agreements "in accordance with the customary rules of interpretation of public international law".[5]

6. So, the role of the Panel here – per the terms of the DSU – is to make its own objective assessment and undertake its own interpretive analysis applying the customary rules of interpretation.

7. Yesterday, the United States suggested a thought experiment that the Panel may wish to employ. That is, the Panel may find it useful to set aside (initially) all findings in prior reports concerning the meaning of Article 2.4.2 of the AD Agreement – or any provision of the AD

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[1] *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*.

[2] *Understanding on Rules and Procedures Governing the Settlement of Disputes.*

[3] DSU Article 7.1 (setting panel's terms of reference as "To examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB by (name of party) in document ... and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s).").

[4] DSU Article 11 (second sentence).

[5] DSU Article 3.2 (second sentence).

Agreement, really. Approach the text without any preconceived notions about its meaning or purpose and undertake your own interpretive analysis pursuant to the customary rules. See what conclusions you reach. One would think that different adjudicators applying the customary rules of interpretation should reach similar interpretive conclusions, if each adjudicator applies the customary rules of interpretation correctly.

8. After reaching your own preliminary interpretive conclusions, then take into account the findings in prior reports. Assess whether you have reached the same conclusions as each prior panel or the Appellate Body. If so, the Panel might find it has a certain greater degree of confidence in its own conclusions, which accord with the conclusions reached by each other panel and the Appellate Body. But if the Panel reaches conclusions that differ from those reached by a prior panel or the Appellate Body, it would be important to give that some serious thought. Did the Panel commit an error of interpretation in reaching its preliminary conclusions? Or did an earlier panel or the Appellate Body commit an error?

9. If the Panel considers that its interpretive conclusions are correct, and findings in prior reports are incorrect, it would be incompatible with the role of the Panel to make an objective assessment of the "applicability of and conformity with *the covered agreements*" simply to follow incorrect findings in prior reports. And such an approach, which is contrary to the DSU, would do nothing to contribute to the security and predictability of the multilateral trading system. Quite the opposite, it would erode Members' confidence in the system.

10. Canada and certain third parties observe that the United States has cited prior Appellate Body reports, and they suggest that this shows that the United States is being inconsistent in arguing that the Panel should not follow incorrect findings in prior reports. There is no inconsistency at all. Of course, the United States routinely refers to findings in prior panel and Appellate Body reports that have been adopted by the DSB. And the Panel appropriately should take into account relevant findings in prior reports <u>where the Panel considers those findings persuasive</u>. But the Panel should not simply follow the findings in prior reports, <u>especially in a situation where the Panel considers that the findings are flawed</u>.

11. The argument that subsequent panels should always "follow" findings in prior reports has the disturbing implication that the findings made by the first adjudicator to interpret a provision – even if that interpretation is plainly wrong – should be followed by a subsequent panel simply because the wrong interpretation was the first interpretation. Again, under such an approach, the DSU would not contribute to "providing security and predictability to the multilateral trading system," but rather would erode the legitimacy of the WTO and its dispute settlement system.

12. During the course of this proceeding thus far, including in its first written submission, in its opening statement, and when pressed during the back-and-forth of the question and answer session, Canada has refused to engage with the text of the AD Agreement. Canada has opted instead to insist repeatedly that the resolution to this dispute is to be found in prior reports of the Appellate Body, rather than in the text of the AD Agreement. As the United States has demonstrated, the result Canada seeks cannot be reconciled with the ordinary meaning of the terms of the second sentence of Article 2.4.2 of the AD Agreement, read in their context, and in light of the object and purpose of the AD Agreement. Canada's aim appears not to be to give

meaning to the terms of the second sentence of Article 2.4.2, but to deprive it of any meaning whatsoever.

13. The United States hopes that the U.S. first written submission and the U.S. presentation during this meeting have been helpful for the Panel. We look forward to receiving the Panel's written questions and we will endeavor to provide responses that bring clarity and understanding to the many complex issues in this dispute. Ultimately, we seek to aid the Panel in arriving at the correct conclusions, based on proper interpretations of the covered agreements. We are confident that the Panel will make the assessment called for in the DSU and on that basis reject Canada's claims.

14. Once again, the United States thanks the Panel members, and the Secretariat staff assisting you, for their time and attention to this important matter.