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United States – Final Dumping Determination on Softwood Lumber from Canada

Recourse to Article 21.5 of the DSU by Canada

(AB-2006-3)

OPENING STATEMENT OF THE UNITED STATES OF AMERICA

June 24, 2006

1. Members of the division, good morning. We are pleased to have this opportunity to present the views of the United States.

2. In our statement today we will demonstrate, as we did in our appellee submission, that the Panel report represents a well-reasoned interpretation of Articles 2.4.2 and 2.4 of the *Antidumping Agreement* and should be upheld. Canada's appeal rests on a simple but incorrect assumption. Canada wrongly assumes that in the Section 129 Determination, when the U.S. Department of Commerce aggregated the results of transaction-to-transaction comparisons of normal value and export price, each result constituted an "intermediate value," while only the aggregation constituted a "margin of dumping." That assumption has no support in the text of the *Antidumping Agreement*, nor does it follow logically from the Appellate Body reasoning on which Canada relies.

3. Canada's core assumption stems from an analogy to the Appellate Body report in the underlying dispute. There, the Appellate Body found that average-to-average comparisons for individual sub-products of the product "softwood lumber" constituted "intermediate values," while only the aggregation of those results constituted a "margin of dumping." Canada now argues that a comparison between a single normal value transaction and a single export transaction is just like an average-to-average comparison for a sub-product, inasmuch as each

comparison yields nothing more than an intermediate value on the path towards establishment of a margin of dumping.

4. The problem is that, while the *Antidumping Agreement* does *not* contemplate a margin of dumping being established for a sub-product, it *does* contemplate a margin of dumping being established for a particular export transaction involving the product. Thus, from its very starting point, Canada's analogy is flawed. Since the rest of its argument follows from that flawed starting point, it must be rejected. In our appellee submission, we discussed in some detail this basic error in Canada's reasoning. This morning, we will underscore the key points.

This is the First Appeal to Raise the Question of Whether the *Antidumping Agreement* Requires Offsets When Establishing Margins of Dumping Using the Transaction-to-Transaction Comparison Methodology

5. The main theme of Canada's appellant submission is that the question on appeal has already been decided.[1] In our appellee submission, we showed that this is not so.[2] This point bears emphasis, especially now that certain third participants' have echoed Canada's theme.[3]

6. This is the first time that the issue of the denial of offsets for non-dumped transactions when using a transaction-to-transaction comparison methodology has been raised to the Appellate Body. We are well aware that other disputes, including, obviously, the underlying *Lumber* dispute, have raised questions about offsets. However, in those disputes, the Appellate Body made a point of stating that it was not addressing the issue of offsets with respect to the transaction-to-transaction comparison methodology in antidumping investigations.

[1] *See, e.g.*, Canada Appellant Submission, paras. 5, 29, 37-38, 41, 48-50, 61, 67.

[2] *See, e.g.*, U.S. Appellee Submission, paras. 3-5, 24-28, 53-67, 104-106.

[3] *See, e.g.*, EC Third Participant Submission, paras. 2, 13, 24, 33, 35-36; Japan Third Participant Submission, paras. 1, 7-8, 23; Thailand Third Participant Submission, paras. 3-4, 20, 21, 25.

7. Article 2.4.2 of the *AD Agreement* provides for three different types of normal value-to-export price comparisons that may be used in an investigation. One methodology, the average-to-average methodology, was the subject of the *EC - Bed Linen* and the original *Softwood Lumber* disputes. In *US – Zeroing (EC)*, the issue on appeal related to assessment proceedings pursuant to Article 9.3, and the Appellate Body's findings did not rely on Article 2.4.2.[4] In both *Softwood Lumber* and *US – Zeroing (EC)*, however, the United States made arguments based on the transaction-to-transaction and average-to-transaction methodologies in Article 2.4.2 as context. We sought to show that if the complaining parties' arguments were accepted, they would have anomalous implications for these other methodologies.

8. In both disputes, the Appellate Body declined to address these contextual arguments. In *Softwood Lumber*, notably, it explained that it could not consider the contextual argument without first determining whether "zeroing" is permissible pursuant to those methodologies.[5] Similarly, in *US – Zeroing (EC)*, the Appellate Body expressly noted that it was not addressing the permissibility of zeroing under the transaction-to-transaction or average-to-transaction methodology. Canada's contention that the issue now on appeal has already been decided cannot be reconciled with the Appellate Body's restraint in those reports with respect to these other methodologies in Article 2.4.2.

9. The issue of whether Article 2.4.2 or 2.4 requires the results of non-dumped transaction-to-transaction comparisons to offset the results of dumped transaction-to-transaction comparisons is now squarely before the Appellate Body. In implementing the DSB

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[4] *See US - Zeroing (AB)*, para. 164.

[5] Original Appellate Body Report, para. 105; *see also US - Zeroing (AB)*, para. 203.

recommendations and rulings in the underlying dispute, the United States used a transaction-to-transaction comparison methodology to establish the existence of margins of dumping. That approach enabled Commerce to compare sales of the identical product, on the very same day, at the same level of trade, sometimes even in identical quantities. In other words, it allowed for a more precise comparison than could be achieved under the average-to-average approach.

10. This approach harkens back to the 1960 report of the Group of Experts. Analyzing different ways to determine whether goods are being dumped, the Group of Experts considered the ideal method to be one focused separately on *each single importation* of the product.[6] That, in essence, is what the transaction-to-transaction comparison methodology does. The question at issue here, which the Appellate Body has not previously addressed, is whether the *AD Agreement* required the United States to reduce the margins of dumping found for some transactions by the amount that *other* transactions exceeded normal value. The Panel correctly found the answer to be, No.

The Irrelevance of the "Product as a Whole" Concept to the Present Question

11. Canada's appeal rests largely on the proposition that any determination of the existence of margins of dumping must be based on the "product as a whole," as Canada understands that concept. Specifically, according to Canada, it must pertain to the entire universe of exported product subject to the antidumping investigation.

[6] The Second Report of the Group of Experts on *Anti-Dumping and Countervailing Duties*, adopted on 27 May 1960, BISD 9S/194, para. 8.

The "Product as a Whole" Concept as Articulated in *EC - Bed Linen* and *Softwood Lumber*

12. The "product as a whole" concept was referred to by the Appellate Body in the *EC - Bed Linen* dispute and then reiterated in the original *Softwood Lumber* dispute. In *EC - Bed Linen*, the product had been divided into multiple sub-products by model. For each sub-product, the EC compared the average export price to the average normal value. The EC argued that the result of each sub-product comparison was itself a margin of dumping. It also argued that it took into account "all comparable export transactions" at the sub-product level, and that, because transactions across sub-products were not "comparable," it was under no obligation to provide an offset for one sub-product based on a "negative margin" calculated for another sub-product.

13. The Appellate Body rejected the EC's approach, reasoning that the *AD Agreement* does not provide for the establishment of margins of dumping for sub-products. When using the average-to-average methodology, an investigating authority must establish a margin of dumping based on "all comparable export transactions" for the product writ large – as distinct from individual sub-products. In that context, the results of individual sub-product comparisons were merely intermediate results along the way to establishing a margin of dumping for the "product as a whole." The Appellate Body said much the same thing in the original *Softwood Lumber* dispute.

14. Canada completely ignores the context in which the "product as a whole" concept was referred to by the Appellate Body in *EC - Bed Linen* and then reiterated in *Softwood Lumber*. Instead, it makes a generalization not supported by the underlying Appellate Body reasoning – not to mention the text of the *AD Agreement*. Making an overly simplistic – and, ultimately

baseless – analogy, it treats each transaction-to-transaction comparison as if it were akin to an average-to-average comparison for an individual sub-product. Having asserted that similarity, it assigns the label "intermediate value" to the result of each transaction-to-transaction comparison. Continuing the analogy, it concludes that just as a margin of dumping is established only when the results of all sub-product comparisons are aggregated, so a margin of dumping is established only when the results of all transaction-specific comparisons are aggregated.

15. The problem with this analogy is that the resemblance between the two methodologies on which Canada relies is completely superficial. Most significantly, unlike an average-to-average comparison for a given sub-product, a transaction-to-transaction comparison in which export price is less than normal value is itself a margin of dumping and not a mere intermediate value. That is clear from the text of Article 2.4.2 of the *AD Agreement*, as well as Article VI of the *GATT 1994*, both of which refer to a margin of dumping in transaction-specific terms.[7]

16. Since each transaction-to-transaction comparison for which export price is less than normal value is itself a margin of dumping, Article 2.4.2 does not require the aggregation of transaction-to-transaction comparisons to arrive at a margin of dumping. The fact that Commerce aggregated comparison results arrived at using the average-to-average methodology in the original determination and aggregated comparison results arrived at using the transaction-to-transaction methodology in the Section 129 Determination is a superficial resemblance. As the Appellate Body previously explained, when Commerce used the average-to-average methodology, the aggregation of sub-product comparisons was necessary to arrive at a margin of

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[7] *See, e.g.,* U.S. Appellee Submission, paras. 18-21, 43-48.

dumping.[8] When Commerce used the transaction-to-transaction methodology, aggregation was *not* necessary to arrive at margins of dumping. While it may have been necessary to aggregate the results of the transaction-to-transaction comparisons in order to make the *de minimis* analysis under Article 5.8, it was not necessary to do so to establish the existence of margins of dumping pursuant to Article 2.4.2.

The Text of Article 2.4.2 Refutes Canada's Analogy

17. The fatal flaw in Canada's argument is evident from the text of Article 2.4.2 of the *AD Agreement*. That text expressly provides for establishing the existence of margins of dumping on a transaction-to-transaction basis. It does not provide for establishing the existence of margins of dumping on a sub-product basis. Therefore, the premise that the results of transaction-specific comparisons are just like the results of average-to-average comparisons for particular sub-products – in that both are merely "intermediate values" along the way to establishing a margin of dumping – is patently false. The results of transaction-specific comparisons – without any additional steps – are themselves the very things an investigating authority is required to establish under Article 2.4.2 – margins of dumping; the results of average-to-average comparisons for multiple sub-products are not.

18. Notwithstanding this obvious textual distinction, it has been argued that the word "basis" as used in the first sentence of Article 2.4.2 applies to both the average-to-average and the transaction-to-transaction methodology, and that this similarity suggests that, in both cases, a subsequent step must occur after the initial comparison, whether that comparison is transaction-

[8] Original Appellate Body Report, paras. 97-103.

specific or sub-product-specific. The initial comparisons form a foundation or "basis" for the establishment of margins of dumping, the argument goes, and therefore, the elements of that basis are necessarily "intermediate values."[9] A careful reading of the text of Article 2.4.2, however, confirms just the opposite.

19. The first sentence of Article 2.4.2 provides that "the existence of margins of dumping during the investigation phase shall normally be established *on the basis of* [average-to-average comparisons] or *by* a comparison of normal value and export prices on a transaction-to-transaction basis." Thus, margins of dumping may be established "on the basis of" one type of comparison – average-to-average – or "by" a different type of comparison – transaction-to-transaction. Canada and certain third participants gloss over this important distinction.

20. The phrase "on the basis of" in the first part of the sentence anticipates that arriving at a margin of dumping when using the average-to-average methodology may involve multiple steps.[10] The investigating authority is called upon to perform a process – average-to-average comparisons – which results in the foundation – "the basis" – from which the ultimate objective will be derived. Thus, the average-to-average comparisons need not necessarily be the end result; they are "the basis."

21. By contrast, transaction-to-transaction comparisons are not "the basis" for establishing the existence of margins of dumping. It is "by" transaction-to-transaction comparisons that the

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[9] *See, e.g.*, EC Third Participant Submission, para. 13.

[10] *See The New Shorter Oxford English Dictionary*, Vol. I at 188 (1993) (definition 5 defining "basis" as "[a] thing on which anything is constructed and by which its constitution or operation is determined"); *cf.* Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, adopted 23 October 2002, paras. 242-44; Appellate Body Report, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, paras. 161-66.

existence of margins of dumping is established. Accordingly, Article 2.4.2 provides that a transaction-to-transaction comparison is a process that itself – independent of any other step – yields a margin of dumping.

22. Had the drafters of Article 2.4.2 intended the transaction-to-transaction methodology to operate in the same way as the average-to-average methodology, but for the elements being compared, they easily could have adopted a parallel structure. That the drafters chose different words to frame the two different methodologies must be understood as having some significance.[11] Indeed, it confirms the understanding that a margin of dumping may be transaction-specific.

Context Refutes Canada's "Product as a Whole" Premise

23. Finally, it is important to consider the implications of Canada's "product as a whole" premise for provisions other than Article 2.4.2 of the *AD Agreement* and Article VI of the *GATT 1994*. Canada's argument is based on an absolute, unqualified premise. Canada assumes that the term "product" as used in the *AD Agreement* and the *GATT 1994* never refers to the object of a single transaction, but always to the product writ large. Because that assumption leads to absurd results when applied to provisions that form context for Article 2.4.2 of the *AD Agreement* and Article VI of the *GATT 1994*, the Appellate Body must question its validity with respect to the provisions in question.

[11]*See* Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, p. 12 ("'interpretation must give meaning and effect to all the terms of the treaty'" (quoting Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, adopted 20 May 1996, p. 23)).

24. In fact, separating the "product as a whole" concept from the particular context in which it was articulated cannot be reconciled with the use of the term "product" elsewhere in the *AD Agreement* and the *GATT 1994*. For example, as the Panel found in this dispute, the word "product" is used in Article VII:3 of the *GATT 1994*, which refers to "the value for customs purposes of any imported product." In that context, the word "product" clearly refers to an importation-specific determination, rather than some broader grouping of importations over some unstated period of time.[12]

25. Similarly, Article II:2(b) of the *GATT 1994* uses the term "product" in relation to "any anti-dumping or countervailing duty applied consistently with the provisions of Article VI." If, as Canada argues, the term "product" for purposes of Article VI "clearly" means "product as a whole," then the term "product" for purposes of Article II would also mean "product as a whole" – particularly in light of the cross-reference. However, this is problematic if, as Canada contends, "product as a whole" requires an examination and aggregation of multiple transactions.

26. A uniform interpretation of "product" would mean, for example, that a Member simply would have to ensure that the duty applied to the "product as a whole" does not exceed the bound rate in its tariff schedule, regardless of whether the duty imposed on any single importation exceeded that rate. Unquestionably, that result is not what the WTO Members intended.

27. As we discussed at some length in our written submission, the Panel also discussed a number of other provisions that provide contextual support for its findings. We will not repeat

[12] Article 21.5 Panel Report, para. 5.23, n.36.

that discussion here. However, we do wish to highlight one point concerning the Article 2.4.2 provision on "targeted dumping" as context. The Panel in this dispute is now the second panel of trade remedy experts to consider contextual arguments based on the targeted dumping methodology.[13] After extensive argumentation by multiple parties, both panels came to the same conclusion – that an absolute "product as a whole" concept, removed from the context in which it was articulated, necessarily would nullify the targeted dumping provision.[14] That result provides strong contextual support for the Panel's rejection of Canada's "product as a whole" premise and, accordingly, the argument that flows from it.

The Fair Comparison Requirement of Article 2.4

28. In the interest of brevity, we have not elaborated on our written response to Canada's Article 2.4 argument. As discussed in our appellee submission, that argument by Canada assumes its own conclusion. Illogically, Canada simply asserts that a methodology is not fair if it yields a higher margin of dumping than another methodology. Moreover, Canada suggests that because, in its view, the Panel erred with respect to Article 2.4.2, it also erred with respect to Article 2.4.[15] However, as discussed today and in our written submission, the Panel did not err with respect to Article 2.4.2. Accordingly, Canada's Article 2.4 argument must fail as well.

Conclusion

29. This concludes our opening statement. The United States again thanks the Appellate Body for its consideration and we look forward to responding to your questions.

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[13]The first was the panel in the *US - Zeroing (EC)* dispute.

[14]Article 21.5 Panel Report, paras. 5.33 to 5.52; *US - Zeroing (EC) (Panel)*, paras. 7.266, 7.269.

[15]*See* Canada Appellant Submission, para. 70.