United States – Investigation of the International Trade Commission in Softwood Lumber from Canada

WT/DS277

Closing Statement of the United States
Second Meeting of the Panel

October 7, 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 matter. We recognize that there is a lot of information to absorb and that evaluating the information and developing a report is not an easy task. We greatly appreciate your service in aiding the United States and Canada to resolve this dispute.

2. There are several statements Canada made this morning on which we would like to comment. My colleague will address these points.

3. As we indicated this morning, the Commission conducted an objective examination, as evident in the ITC Report, in which its evaluation of the relevant factors and facts was unbiased and even-handed. Canada, on the other hand, continues to draw to the Panel's attention only those facts and findings that favor Canada's arguments. Canada overlooks substantial parts of the ITC's discussion of various issues and arguments, and substantial parts of the record evidence, in presenting its arguments to the Panel.

4. Canada frequently asserts that the United States in relying on *ex post facto* rationalizations and justifications in its defense of the ITC determinations.[1] Yet in making these assertions Canada dismisses and omits explicit statements made by the Commission in its opinion. We have cited to a number of these omissions in our written submissions. This morning, in our opening statement, we quoted statements explicitly made by the Commission, or

[1] *See* Canada Oral Statement at Second Panel Meeting, para. 3

referred the Panel to pages, in the ITC's Report, that Canada has ignored and instead often characterizes as *ex post facto* rationalizations.[2] One example, discussed this morning involves Canada's claims that the ITC did not discuss price trends in its threat of injury analysis.[3] It is clear on pages 43 of the ITC Report (attached to the U.S. opening statement) that the ITC explicitly did conduct a price trends analysis.

5. An examination of the ITC Report demonstrates that the Commission's determinations reflect the facts as a whole and are consistent with all U.S. obligations under the covered agreements. Contrary to Canada's claims, it is important to understand that consideration and explanation of a factor in any section of the ITC Report does not limit its application to that section of the report. The report must be viewed as a whole, with analysis conducted in any particular section potentially having a bearing on analysis in other sections.

6. The United States has addressed the issues in detail in written submissions to this Panel and will not repeat those arguments here. We will, however, provide a few brief comments clarifying or placing in perspective certain issues raised by Canada.

- The Commission properly examined any known factors other than the dumped and subsidized imports that might be injuring the domestic industry to ensure that it did not improperly attribute injury from other causal factors to the subject imports. Canada implies that further consideration or examination is required even if an alleged factor is found not to be an "other known factor."[4] When the Commission finds a factor not to have injurious effects on the

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[2] *See, e.g.,* U.S. Opening Statement at Second Panel Meeting, paras. 23, 25-27, 31, 36, and 43.

[3] Canada Second Written Submission, para. 26.

[4] *See* Canada's Oral Statement at Second Panel Meeting, paras. 43-47.

domestic industry, such factor is not an "other known factor" for purposes of Article 3.5 of the Antidumping Agreement or Article 15.5 of the SCM Agreement. If a factor is not an "other known factor," there is no obligation to further examine it. Canada is wrong.

- One example where evidence demonstrates that an alleged other factor is not a "known" other factor is nonsubject imports. Canada continues to attempt to portray nonsubject imports as other known factors in face of the facts to the contrary. Non-subject imports never accounted for more than 2.6 percent of apparent consumption; subject imports accounted for at least 34 percent of the U.S. market. Moreover, individual country non-subject imports would have been deemed negligible, with no individual country accounting for more than 1.3 percent of imports while Canadian imports accounted for about 93 percent of all imports.[5]

- On the issue of substitutability/attenuated competition, it is Canada that has failed to address the evidence before the Commission. As discussed in the U.S. first written submission and the ITC Report, and this morning, the simple fact is, subject imports and domestic species of softwood lumber are used in the same applications, and prices of a particular species will affect the prices of other species.[6] Canada states that "some Canadian imports in high demand in the United States were employed for end uses for which domestic products competed only on a limited basis."[7] But, the facts do not support its claim. Canadian imports are

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[5]*See* U.S. Response to Panel Question 26, para. 33, n. 60; ITC Report at II-7, n. 23 ("Official statistics from the Department of Commerce reveal that nonsubject imports accounted for 6.9 percent of the overall quantity of softwood lumber imports into the U.S. market in 2001, with Brazil, Chile, and New Zealand accounting for 1.3, 1.1, and 1.0 percent, respectively. Germany, Sweden, and Austria accounted for 1.0, 0.8, and 0.5 percent, respectively, while Lithuania, the Czech Republic, Mexico, and all other countries accounted for the remaining 1.2 percent of 2001 softwood lumber imports.").

[6]U.S. First Written Submission, paras. 269-278 and ITC Report at 25-27 (USA-1).

[7]Canada's Oral Statement at Second Panel Meeting, para. 40.

primarily SPF; SPF accounts for about 87.7 percent of Canadian imports and about 85 percent of Canadian softwood lumber production. As demonstrated by Exhibit USA-23, discussed this morning, Canadian SPF and U.S. Southern Yellow Pine are used for the same applications. Thus, these products compete. Canada also imports Douglas fir, hem-fir, western red cedar, and a few other products; all of these species also are produced in the United States. Canada now attempts to rely on a U.S. court case with a very different fact pattern to support its attenuated competition arguments. But, this attempt should fail because in that court case about 20 percent of the imports were for a niche product which had no comparable domestic product, *i.e.*, the products were not used in the same applications nor were they interchangeable.

7. Mr. Chairman, members of the Panel, we have just one final point to make. In its opening statement, Canada took issue with the U.S. discussion of Canada's request for a suggestion pursuant to DSU Article 19.1. The United States does not deny—as implied by Canada's statement—that Article 19.1 allows a panel to make a suggestion in appropriate cases. What we have argued is that no suggestion, and certainly not the suggestion Canada proposes, is appropriate in this case. Canada asks the Panel to make a suggestion that goes well beyond steps to bring about conformity with WTO obligations. For that reason, this Panel, like the panel in *United States-Hot Rolled Steel*, should decline the request for a suggestion. Of course, as we discussed in our earlier submissions, there is no need for any suggestion in this case because the ITC's determination was entirely consistent with WTO obligations.

8. Mr. Chairman and members of the Panel, our arguments today and in our prior submissions demonstrate that the ITC's determination in this case was entirely consistent with U.S. obligations under the covered agreements. For the reasons we have laid out, the Panel

should reject Canada's claim in its entirety. We are prepared to respond to any questions the Panel may pose following today's meeting. Again, we thank you, Mr. Chairman and members of the Panel, for your service in this matter.