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 FIRST WRITTEN SUBMISSION OF THE UNITED STATES

July 14, 2005

Introduction

1. It is a fundamental tenet of WTO dispute settlement that "[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."[1] Nevertheless, adding to the obligations of the United States is precisely what Canada seeks to do through the present dispute settlement proceeding. Specifically, it asks the Panel to find an obligation on the U.S. Department of Commerce ("Commerce") in establishing the existence of margins of dumping using the transaction-to-transaction methodology, though such an obligation has no basis in any article of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("*AD Agreement*").

2. Canada asks the Panel to find that, when aggregating the results of multiple transaction-to-transaction comparisons, Commerce has an obligation to offset the results of comparisons in which export prices are less than normal value with the results of comparisons in which export prices are greater than normal value. There is no textual basis for such an obligation. While Canada urges the Panel to extend the logic that allowed the original panel and the Appellate Body to find an offset obligation with respect to the average-to-average methodology, the leap to an obligation under the transaction-to-transaction methodology has no textual support. The key language relied upon to find an obligation in the first case is glaringly absent in the second.

Procedural History

3. At issue in the underlying dispute was Commerce's Final Determination in the less than fair value investigation on certain softwood lumber from Canada.[2] Canada asserted numerous claims regarding the initiation, scope, and methodologies applied in that investigation. The original panel rejected all of those claims except one, concerning an aspect of Commerce's methodology for establishing margins of dumping, and the Appellate Body upheld that result.[3] Following the DSB's adoption of its recommendations and rulings on August 31, 2004, the United States undertook to come into compliance with its obligations under the *AD Agreement*.

4. Commerce engaged in a process that resulted in the modification of its methodology for

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[1] *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), Arts. 3.2 and 19.2.

[2] *See Notice of Final Determination of Sales at Less Than Fair Value: Certain Softwood Lumber Products from Canada*, 67 Fed. Reg. 15,539 (April 2, 2002) ("*Final Determination*") and accompanying Issues and Decision Memorandum. Following an affirmative injury determination by the United States International Trade Commission, Commerce amended its final determination and published an antidumping duty order on May 22, 2002. *See Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Softwood Lumber Products From Canada*, 67 Fed. Reg. 36,068 (May 22, 2002). These documents were exhibits before the panel in the underlying proceeding (specifically, exhibits CDA-1, CDA-2, and CDA-3). As these documents are not otherwise referred to in this submission, they have not been attached as exhibits. However, the United States would be pleased to make them available, should the Panel so request.

[3] AB Report and Panel Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS64/AB/R and WT/DS64/R, respectively, adopted Aug. 31, 2004 (referred to hereafter as "AB Report" and "Panel Report," respectively).

establishing the existence of margins of dumping for softwood lumber from Canada.[4] The new methodology involved transaction-to-transaction comparisons of United States export prices, or constructed export prices, of certain softwood lumber to identical or similar normal value transactions in Canada. For comparisons for which the U.S. sale was made at less then normal value, the results were aggregated and divided by the total of all the respondent company's U.S. sales to determine whether the dumping margin for that respondent was above the *de minimis* level.[5] Commerce's new determination ("Section 129 Determination") was issued on April 15, 2005 and entered into force effective April 27, 2005.[6]

Scope and Standard of Review

5. With respect to the scope of the present proceeding, Canada states in its first written submission that "the mandate of Article 21.5 panels is to examine the consistency of measures taken to comply with the recommendations and rulings of the DSB with obligations under the covered agreements."[7] The United States does not disagree with that proposition. What is curious, however, is the statement that follows, in which Canada urges the Panel not to confine itself to "the perspective of the claims, arguments, and factual circumstances relating to the measure that was the subject of the original proceeding."[8] The United States notes, in particular, Canada's apparent effort to distance itself from "arguments . . . relating to the measure that was the subject of the original proceeding."[9] While it is true, of course, that this Panel is not "confined" to examine the measure now at issue from the perspective of arguments made in the underlying proceeding, it is not unreasonable to expect a modicum of consistency between a party's arguments in the original proceeding and its arguments before a panel established pursuant to Article 21.5. Yet, in Canada's case, such consistency is noticeably lacking.

6. In the underlying proceeding, both before the panel and before the Appellate Body, Canada's argument with respect to an offset requirement purported to be firmly grounded in text – in particular, the phrase "all comparable export transactions" in Article 2.4.2 of the *AD*

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[4]The process involved the application of the new methodology in a preliminary determination issued to the interested parties, followed by briefing on the new methodology by the interested parties, followed by the issuance of a final determination.

[5]By contrast, in the measure at issue in the underlying proceeding, Commerce had established margins of dumping by dividing the product under consideration into sub-groups according to model, level of trade, etc., performing weighted-average-to-weighted-average comparisons for each sub-group.

[6]By the time Commerce issued its Section 129 Determination, it already had completed an administrative review of each of the investigated exporters and producers. Accordingly, the Section 129 Determination had no practical effect on the cash deposit rate applicable to those companies' exports. The "all others" rate established in the Section 129 Determination does currently apply to exports of companies subject to that rate. *See Notice of Determination Under Section 129 of the Uruguay Round Agreements Act; Antidumping Measures Concerning Certain Softwood Lumber Products From Canada*, 70 *Fed. Reg.* 22,636 at 22,645 to 22,646 (Dep't Commerce May 2, 2005) ("Section 129 Determination") (Exhibit CDA-1). Canada glosses over this distinction in its recitation of the facts in its first written submission.

[7]Canada First Written Submission, para. 20.

[8]Canada First Written Submission, para. 20.

[9]Canada First Written Submission, para. 20.

Agreement. Thus, in its submission to the Appellate Body, Canada stated, "The Panel's interpretation of Article 2.4.2 should be upheld because it is consistent with the ordinary meaning of the requirement in Article 2.4.2 that 'all comparable export transactions' be included in a weighted-average to weighted-average dumping calculation."[10] Similarly, in its first submission to the original panel, Canada argued that "zeroing" was prohibited in the aggregation of average-to-average comparisons "precisely because it fails to take *fully* into account all comparable export transactions."[11] And, in its second submission to the original panel, Canada urged, "'All comparable export transactions' requires inclusion of export transactions that result in positive intermediate margins as well as those that result in negative intermediate margins."[12]

7. While the United States disagreed with Canada's proffered interpretation of "all comparable export transactions," the debate undeniably was about the meaning of that text. By contrast, in the present proceeding, Canada has departed from a textual basis for its argument all together. It cannot rely on the phrase "all comparable export transactions," because that phrase does not modify the provision in Article 2.4.2 that refers to the transaction-to-transaction methodology. Instead, Canada attempts to leverage the obligation found to exist with respect to the average-to-average methodology in order to identify a new obligation with respect to the transaction-to-transaction methodology. This may be why Canada is now trying to distance itself from arguments in the underlying proceeding that were so closely bound to particular text.

8. With respect to the standard of review, the applicable rule (as in the underlying proceeding) is set forth in Article 17.6 of the *AD Agreement*. In particular, since the only issue now in dispute is a legal issue, the applicable rule is that set forth in clause (ii) of Article 17.6. As the original panel explained, Article 17.6(ii) contains "an explicit acknowledgment that the relevant provision/s of the *AD Agreement* may admit of more than one permissible interpretation, and an instruction that, if this process of treaty interpretation leads us to the conclusion that the interpretation of the provision in question put forward by the defending party is permissible, we shall find the measure in conformity with the *AD Agreement* if it is based on that permissible interpretation."[13]

9. In this submission, the United States will demonstrate that the measure taken to comply with the recommendations and rulings of the DSB was consistent with a permissible interpretation of Articles 2.4.2 and 2.4 and, accordingly, should be upheld.

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[10]Canada Appellee's Submission, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264, para. 22 (June 7, 2004) ("Canada Appellee's Submission") (Exhibit US-1); *see also id.*, paras. 35-37 (defending original panel report based on interpretation of words "all comparable export transactions").

[11]Canada First Written Submission, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264, para. 171 (April 11, 2003) ("Canada First Written Submission (Original)") (Exhibit US-2); *see also id.*, para. 170 (same).

[12]Canada Second Written Submission, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264, para. 141 (July 9, 2003) ("Canada Second Written Submission (Original)") (Exhibit US-3); *see also id.*, para. 144 (same).

[13]Panel Report, para. 7.11.

The Section 129 Determination is Consistent With Article 2.4.2 of the *AD Agreement*

10. Article 2.4.2, first sentence reads as follows:

> Subject to the provisions governing fair comparison in paragraph 4, 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 or by a comparison of normal value and export prices on a transaction-to-transaction basis.

The first sentence thus contemplates two alternative methodologies that "normally" are to be used to establish the existence of margins of dumping during the investigation phase: the average-to-average methodology and the transaction-to-transaction methodology.

11. Canada's argument with respect to Article 2.4.2, as laid out in its first submission, essentially relies on a generalization of the reasoning of the Appellate Body in the underlying proceeding. There, the Appellate Body found: that when applying the average-to-average comparison methodology, Commerce established and compared multiple sub-groups of the like product "softwood lumber", obtaining "intermediate values"; that it could establish margins of dumping only by aggregating those intermediate values; and that in doing so, Article 2.4.2 required it to include all of the intermediate values obtained. Canada extrapolates from this finding that, because the transaction-to-transaction methodology also allegedly yields intermediate values, an aggregation of those values to establish a single margin of dumping also must include all of the intermediate values.[14]

12. There are two principal flaws with this line of reasoning. First, it does not comport with the textual basis for the findings by the Appellate Body and the panel in the underlying proceeding. Second, it assumes incorrectly that an obligation found with respect to the average-to-average methodology logically must extend to the transaction-to-transaction methodology, notwithstanding differences between the two methodologies and between the texts of the clauses providing for them.

13. In the underlying proceeding, both the panel and the Appellate Body were careful to stress that the question before them was limited to whether "zeroing" is permitted under the average-to-average methodology.[15] In addressing that question, both the original panel and the Appellate Body engaged in a close reading of the text of Article 2.4.2 and, in particular, the phrase "all comparable export transactions" – a phrase included in the article's articulation of the average-to-average methodology but not in its articulation of the other two methodologies. Thus, the panel found that:

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[14]Canada First Written Submission, paras. 22-25.

[15]*See* AB Report, para. 63 ("[I]n this appeal, we are not required to, and do not address, the issue of whether zeroing can, or cannot, be used under the other methodologies prescribed in Article 2.4.2. . . ."); *id.*, paras. 77, 104, 108: Panel Report, para. 7.219 (noting that the use of the two methodologies described in Article 2.4.2 besides average-to-average are not within the terms of reference); *id.*, paras. 7.196, 7.200, 7.213, 7.214.

> the United States has violated Article 2.4.2 of the *AD Agreement* by not taking into account *all comparable export transactions* when DOC calculated the overall margin of dumping as Article 2.4.2 requires that the existence of margins of dumping has to be established for softwood lumber on the basis of a comparison of the weighted-average-normal-value with the weighted average of prices of *all comparable export transactions*, that is, for all transactions involving all types of the product under investigation.[16]

14. In defending this finding, Canada urged the Appellate Body to uphold the original panel's interpretation of Article 2.4.2 (as noted above) precisely because "it is consistent with the ordinary meaning of the requirement in Article 2.4.2 that 'all comparable export transactions' be included in a weighted-average to weighted-average dumping calculation."[17]

15. In analyzing the question on appeal, the Appellate Body, after addressing the threshold issue of the permissibility of "multiple averaging" under the average-to-average methodology, observed correctly that the crux of the parties' disagreement was "as to the proper interpretation of the terms 'all comparable export transactions' and 'margins of dumping' in Article 2.4.2 as they relate to zeroing."[18] The Appellate Body went on to "emphasize that [the two terms] should be interpreted in an integrated manner."[19] Accordingly, the Appellate Body's conclusion was the result of its interpretation of "all comparable export transactions" together with "margins of dumping."

16. In sum, the term "all comparable export transactions" was central to the findings in the underlying proceeding. Yet, that term is absent from the provision now at issue. The first sentence of Article 2.4.2 contemplates the establishment of margins of dumping in one of two alternative ways: *first*, "on the basis of a comparison of a weighted average normal value with a weighted average of prices of *all comparable export transactions*," (emphasis added) or, *second*, "by a comparison of normal value and export prices on a transaction-by-transaction basis." As interpretation of the term "all comparable export transactions" was essential to the original panel's findings, to Canada's defense of those findings, and to the Appellate Body's findings, this Panel should reject Canada's assertion that the findings from the underlying proceeding should extend to a provision in which that term is absent.

17. The original panel correctly observed, "[W]e are required as treaty interpreters to assume that when the drafters included language in the treaty, that they intended that language to have some meaning."[20] The converse of that observation is also true in this dispute. When the drafters excluded language from the treaty, it must be assumed that they did so deliberately, and the absence of a term in one provision that is included in another provision must not be ignored;

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[16]Panel Report, para. 7.224 (emphases added).

[17]Canada Appellee's Submission, para. 22 (Exhibit US-1).

[18]AB Report, para. 82.

[19]AB Report, para. 85.

[20]Panel Report, para. 7.203.

it must be accorded significance. Here, the obligation that Canada asks the Panel to find is an obligation that has been found to stem from text that is absent from the portion of Article 2.4.2 that addresses the methodology that Commerce used in the measure at issue – the transaction-to-transaction methodology. Because of that crucial textual difference, the Panel should reject Canada's claim that the measure is inconsistent with Article 2.4.2.

18. Moreover, in addition to ignoring the textual difference between the provision at issue in the underlying proceeding and the provision now at issue, Canada's argument is flawed for a second reason. Canada assumes, without explanation, that when it comes to the aggregation of multiple values, there is no difference between the average-to-average methodology and the transaction-to-transaction methodology. Therefore, under Canada's argument, what goes for one necessarily must go for the other. That assumption has no basis.

19. In the underlying proceeding, Canada pointed out that, with respect to the average-to-average methodology, "zeroing fails to compare a 'weighted average' normal value with a 'weighted average' of prices of all comparable export transactions, as required by Article 2.4.2. Due to the conversion of some intermediate margins to zero, the overall margin of dumping that results does not reflect an actual average, in violation of Article 2.4.2."[21] In other words, the problem with "zeroing" when it comes to aggregating the results of average-to-average comparisons, as Canada itself argued, is that it causes the final result to be something other than an "actual average."

20. By contrast, the clause in Article 2.4.2 providing for the transaction-to-transaction methodology makes no reference to an "average" or "averages". In short, the average-to-average methodology and the transaction-to-transaction methodology are textually distinct methodologies. When aggregating results under the former, according to Canada's argument, an investigating authority is required to obtain an "actual average", which arguably involves applying non-dumped results as offsets to dumped results. The transaction-to-transaction methodology, however, does not involve averages. Therefore, the finding of an offset requirement applicable to the first methodology does not mean that an offset requirement logically must apply to the second.

21. Finally, Canada seeks support for its argument on Article 2.4.2 from a footnote in the original panel report.[22] Its reliance on that footnote is entirely misplaced. Canada neglects to recall that in the very same sentence that Canada partially quotes, the original panel acknowledged that it was "not called upon to decide whether zeroing is allowed or disallowed under the transaction-to-transaction and weighted-average-normal-value to individual export transaction methodologies."[23] Accordingly, the statement on which Canada relies is *obiter dictum*. Moreover, the sentence at issue states a conclusion without offering any explanation. And, of course, as the matter was outside of the original panel's terms of reference, it was not the subject of argument before the original panel (other than tangentially, as part of discussion of the

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[21]Canada Second Written Submission (Original), para. 142 (Exhibit US-3).

[22]Canada First Written Submission, paras. 3 and 18 (quoting Panel Report, n.361).

[23]Panel Report, para. 7.219, n.361.

context for the matter that was before the panel).

The Section 129 Determination is Consistent With Article 2.4 of the AD Agreement

22. Regarding Canada's argument with respect to Article 2.4, the United States notes, first, that Canada incorrectly asserts, at paragraph 5 of its first written submission, that the DSB made recommendations and rulings with respect to U.S. obligations under Article 2.4 of the *AD Agreement*.[24] Of course, neither the original panel nor the Appellate Body ever reached the question of compliance of the underlying measure with Article 2.4. Therefore, that provision was not the subject of any recommendation or ruling of the DSB. Nevertheless, the United States recognizes that it is Canada's prerogative to raise in this proceeding the question of the implementing measure's consistency with Article 2.4.

23. Like its argument with respect to Article 2.4.2, Canada's argument with respect to Article 2.4 amounts to a conclusory statement based on an over-generalization of statements in certain Appellate Body reports. In fact, Canada offers no analysis of its own with respect to the interpretation of Article 2.4. It simply quotes two fragments from the Appellate Body reports in *EC – Bed Linen* and *U.S. – Corrosion-Resistant Steel Sunset Review* and says, in effect, "*Quid est demonstratum*."[25]

24. The fragments on which Canada relies are completely irrelevant to the question of whether Commerce's aggregation of the results of transaction-to-transaction comparisons in the present case is consistent with Article 2.4 of the *AD Agreement*. In fact, Article 2.4 was not even at issue in the *EC – Bed Linen* dispute. That dispute concerned, in relevant part, whether the EC's application of the average-to-average methodology was consistent with Article 2.4.2 of the *AD Agreement*.[26] The fragment that Canada quotes regarding Article 2.4, therefore, was *obiter dictum* and, accordingly, should not be relied on as providing any persuasive value in the present dispute.[27]

25. Canada's reliance on a fragment from *U.S. – Corrosion-Resistant Steel Sunset Review* is similarly misplaced. While the question of whether a measure was consistent with Article 2.4 was before the Appellate Body in *Corrosion-Resistant Steel Sunset Review*, it came up in the context of completing the panel's analysis after finding legal error, and the Appellate Body ultimately was unable to reach a conclusion on whether the measure was consistent with Article 2.4.[28] Given that fact, and the fact that the methodology at issue in that dispute was an average-to-transaction comparison methodology used in an assessment proceeding, which differs from

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[24]Canada First Written Submission, para. 5.

[25]Canada First Written Submission, paras. 28-29.

[26]*See* AB Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WT/DS141/AB/RW, adopted March 12, 2001, para. 45(a).

[27]*See* Panel Report, Dissenting Opinion, para. 9.23 (noting that the Appellate Body's statement regarding Article 2.4 in *Bed Linen* report "is *obiter dictum*, as Article 2.4 was not part of a claim before the Appellate Body").

[28]AB Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted January 9, 2004, para. 138.

the transaction-to-transaction comparison methodology at issue here, the fragment quoted by Canada is of no relevance.

26. As Canada makes no argument to support its Article 2.4 claim other than quoting the two irrelevant fragments noted above, Canada has failed to make a *prima facie* case that the Section 129 Determination was inconsistent with Article 2.4 of the *AD Agreement*. As was correctly observed in the original panel report, "[I]n WTO dispute proceedings, the burden of proof rests with the party that asserts the affirmative of a particular claim or defense."[29] Here, Canada has done nothing more than assert a claim followed by two fragments from Appellate Body reports that are not on point. Accordingly, the Panel should find that Canada has failed to make a *prima facie* case that the Section 129 Determination is inconsistent with Article 2.4.

27. Finally, the United States notes Canada's observation that "[p]roper implementation of the DSB's recommendations and rulings in this case would have resulted in a reduction of the margins of dumping for all of the investigated exporters and of the 'all others rate.'"[30] Canada seems to be suggesting that the complaining party (or its stakeholders) *must* fare better under the measure implementing the DSB's recommendations and rulings than it did under the original measure complained of. There is no such standard under the DSU.

Conclusion

28. For the reasons stated above, Canada's claims against the U.S. implementation of the DSB's recommendations and rulings in this dispute are groundless. The United States therefore requests that the Panel reject Canada's claims in their entirety and find that the United States properly implemented the recommendations and rulings of the DSB in this dispute.[31]

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[29]Panel Report, para. 7.13.

[30]Canada First Written Submission, para. 4.

[31]As in the underlying proceeding, Canada asks the Panel to "recommend", pursuant to Article 19.1 of the DSU, that the United States "bring its measures into conformity with its obligations under Article 2.4 and 2.4.2 of the *Anti-Dumping Agreement*" in a particular manner. Canada First Written Submission, para. 31. We understand Canada to be asking for a "suggestion" under Article 19.1 of the DSU. For the reasons set forth in the present submission, there should be no need for such a suggestion, as the United States has come into compliance with its WTO obligations. However, in the event the Panel were to accept Canada's arguments, it nevertheless should decline Canada's requested "recommend[ation]" as inappropriate, as was the case in the original panel and Appellate Body reports. *See* Panel Report, para. 8.6; AB Report, paras. 37, 183(a)-184 (noting Canada's request but declining to grant it); *see also* Panel Report, *United States–Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/R, adopted August 23, 2001, paras. 8.5-8.14. In any event, Canada's request goes beyond anything relevant to implementing a recommendation and again seeks to impose an obligation – "return [of] all anti-dumping cash deposits collected as a result of [Commerce's] failure to eliminate the practice of zeroing" – nowhere called for under the WTO agreements.