BEFORE THE

WORLD TRADE ORGANIZATION

United States - Final Dumping Determination On Softwood Lumber from Canada

WT/DS264

EXECUTIVE SUMMARY OF THE FIRST WRITTEN SUBMISSION OF THE UNITED STATES

May 22, 2003

1. Pursuant to a properly initiated investigation, the United States Department of Commerce ("Commerce") concluded, in a notice of final determination issued April 2, 2002, that softwood lumber from Canada was being sold in the United States for "less than fair value."[1] Commerce found dumping with respect to each of the six Canadian respondents accounting for the largest amount of production in Canada: (1) Abitibi-Consolidated Inc. ("Abitibi"), (2) Canfor Corporation ("Canfor"), (3) Slocan Forest Products, Ltd. ("Slocan"), (4) Tembec, Inc. ("Tembec"), (5) West Fraser Timber Co. Ltd. ("West Fraser"), and (6) Weyerhaeuser Company ("Weyerhaeuser").[2]

2. In general, Canada's claims of error in the initiation and conduct of the softwood lumber investigation concern the sort of fact-bound decisions that any investigating authority must make in the course of an antidumping investigation. Among other things, Canada challenges how Commerce defined the scope of the product it investigated, how it determined the sufficiency of the evidence to initiate an investigation, and how it calculated various costs and adjustments. The claims are disparate, but they share a common theme. In much of its argument, Canada is asking the Panel to place itself in the shoes of Commerce and make new determinations, as if it were the investigating authority. As such, these claims are inconsistent with the applicable standard of review.[3]

3. An antidumping proceeding is a complex matter, involving hundreds, if not thousands of individual decisions that come together to yield a final determination. It is not inconceivable that two different investigating authorities would look at the same facts and reach different conclusions. Recognizing that possibility, the Antidumping Agreement provides that an authority's proper establishment of the facts and unbiased and objective evaluation "shall not be overturned" "even though the panel might have reached a different conclusion."[4] Nevertheless, in this dispute, Canada raises a number of claims that effectively ask this Panel to substitute its evaluation of the facts for Commerce's evaluation of the facts. Canada has even sought to introduce new claims not contained in its panel request and new evidence not made available to Commerce in the underlying investigation.

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[1] *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) (Exhibit CDA-1) and accompanying "Issues and Decision Memorandum," dated March 21, 2002 (CDA-2) (collectively "*Final Determination*"), as amended by *Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Softwood Lumber from Canada*, 67 Fed. Reg. 36,068 (May 22, 2002) ("*Order*") (Exhibit CDA-3). "Fair value" is the U.S. law term corresponding to "normal value," as that term is used in Article VI of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994") and in the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("Antidumping Agreement" or "AD Agreement").

[2] *See Order* (Exhibit CDA-3).

[3] *See* AD Agreement, Article 17.6(i).

[4] *Id*.

4. The Panel first should rule, as a preliminary matter, that certain claims Canada makes in connection with its argument concerning the scope of the "product under consideration" are beyond the Panel's terms of reference. In its request for the establishment of a panel, Canada claimed that Commerce "erroneously determined there to be a single like product (under U.S. law, termed 'class or kind' of merchandise) rather than several distinct like products," and that this determination violated Articles 2.6, 4.1, 5.1, 5.2, 5.3, 5.4, and 5.8 of the AD Agreement and Article VI:1 of the GATT 1994.[5] In its First Written Submission, Canada adds to this claim, now alleging that "in defining the 'product under consideration,'" Commerce violated all of Article 2 of the AD Agreement (not just Article 2.6), Article 3, all of Article 4 (not just Article 4.1), all of Article 5 (not just Articles 5.1, 5.2, 5.3, 5.4, and 5.8), Article 6.10, and Article 9.[6] Canada's expansion of its claim through its First Written Submission is fundamentally at odds with the requirement that a complaining Member state its claims clearly in its panel request, citing the particular provisions it alleges to have been violated.[7] That requirement "defin[es] the terms of reference of a panel and . . . inform[s] the respondent and the third parties of the claims made by the complainant."[8] Here, Canada did not claim violations of provisions other than those cited in its panel request. Accordingly, the Panel should decline to consider the additional claims raised for the first time in Canada's First Written Submission.

5. As a second preliminary ruling, the Panel should decline to consider Exhibit CDA-77. In introducing this exhibit, Canada improperly asks the Panel to consider evidence that was not made available to Commerce in the underlying investigation. Specifically, this evidence consists of a regression analysis performed by one of the Canadian respondents that purports to manipulate certain data used in Commerce's normal value and net realizable value calculations. It is presented here to support Canada's claim that Commerce erred in not making due allowance for particular physical differences in softwood lumber that Canada alleges affect price comparability.[9] However, it was not made available to Commerce during the underlying investigation. Under Article 17.5(ii) of the AD Agreement, a panel's review of an antidumping investigation is to be based upon "the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member." Consideration of Canada's new evidence is inconsistent with that provision. Further, in asking the Panel to consider this new evidence, Canada effectively is asking the Panel to undertake its own establishment and

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[5] Letter from H.E. Sergio Marchi to H.E. Mr. Carlos Pérez del Castillo (Dec. 6, 2002) ("panel request") at numbered para. 2.

[6] *See* Canada First Written Submission, paras. 115 and 142.

[7] Article 6.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") states that a request for a panel "shall . . . identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly."

[8] Appellate Body Report, *Korea–Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted Jan. 12, 2000, para. 124.

[9] *See* Canada First Written Submission, para. 148 n. 139.

evaluation of the facts, contrary to Article 17.6(i) of the AD Agreement. Accordingly, the Panel should decline to consider Exhibit CDA-77.

6. The standard of review applicable to the present dispute is set forth in Article 17.6 of the AD Agreement. With respect to findings of fact, Article 17.6(i) provides that the question is whether an investigating authority's establishment of the facts was proper and whether its evaluation of those facts was unbiased and objective. Conversely, the question is *not* whether a panel would have established the facts or evaluated those facts in the same way as the investigating authority. As the Appellate Body and other panels repeatedly have observed, a panel's role is not to find and evaluate facts *de novo*.[10]

7. With respect to interpretations of the AD Agreement, the question under Article 17.6(ii) is whether an investigating authority's interpretation is permissible. Article 17.6(ii) acknowledges that there may be provisions of the Agreement that "admit[] of more than one permissible interpretation." Where that is the case, and where an investigating authority has adopted one such interpretation, the panel should find that interpretation to be consistent with the AD Agreement.[11]

8. Canada's first claim is that Commerce should have declined to initiate its investigation (or terminated the investigation once it did initiate) because the application for relief by U.S. softwood lumber producers (in U.S. law terms, "the petition") did not include certain information alleged to have been reasonably available to the petitioners (specifically, cost and price data for Weldwood of Canada, Ltd., a subsidiary of petitioner International Paper). The Panel should reject this argument, because the applicable standard for initiation under Article 5.3 of the AD Agreement (and for continuation of an investigation under Article 5.8) – the "sufficient evidence" standard – was met. There is no obligation under the AD Agreement for an investigating authority to decline to initiate or to decline to continue an investigation on the grounds that the application did not include evidence beyond what is sufficient to warrant initiation or continuation.

9. In this case, petitioners included in their petition evidence from multiple, independently reliable sources demonstrating prices for which softwood lumber was being sold in Canada, costs of production of softwood lumber in Canada, and prices for which softwood lumber was being sold for export to customers in the United States. This evidence demonstrated, first, that

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[10] *See, e.g.*, Appellate Body Report, *United States–Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted Aug. 23, 2001, para. 55; Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams From Poland*, WT/DS122/AB/R, adopted Apr. 5, 2001, paras. 114, 117; Panel Report, *United States–Anti-Dumping and Countervailing Measures on Steel Plate From India*, WT/DS206/R, adopted Jul. 29, 2002, para. 7.6.

[11] *See* Panel Report, *Argentina–Definitive Anti-Dumping Duties on Poultry From Brazil*, WT/DS241/R, circulated Apr. 22, 2003, para. 7.341 and n. 223 ("*Argentina–Poultry*") ("We recall that, in accordance with Article 17.6(ii) of the AD Agreement, if an interpretation is 'permissible', then we are compelled to accept it.").

softwood lumber was being sold in Canada for prices below cost of production. Accordingly, pursuant to Article 2.2 of the AD Agreement, the evidence substantiated reliance on constructed normal value as a basis for determining whether there was dumping of softwood lumber. Second, the evidence in the petition demonstrated that export prices for softwood lumber were below constructed normal value – *i.e.*, that softwood lumber was being dumped in the United States.

10. The Weldwood data could not have contradicted the data included in the petition or otherwise detracted from its adequacy and accuracy. At most, the Weldwood data would have given Commerce information about a single producer in a market consisting of hundreds of producers. This would have been in addition to the country-wide data from diverse sources actually included in the petition. Whatever a single company's data might have shown, it could not have negated the sufficiency of the country-wide data actually in the petition demonstrating dumping of the subject product.

11. Article 5.2 of the AD Agreement does not require Commerce to reject a petition that excludes some data, even though the data included are sufficient to warrant initiation of an investigation, and even though the excluded data could not have negated the sufficiency of the included data. The question for Commerce in deciding whether to initiate an investigation is set forth in Article 5.3. That question is whether the evidence in the petition is sufficient to warrant initiation. Similarly, under Article 5.8, the question whether to continue or terminate an investigation hinges on sufficiency. Canada's suggestion that the AD Agreement contains a standard for initiation and continuation of an investigation other than sufficient evidence is unfounded and should be rejected.

12. Canada's second claim is that Commerce defined the scope of the "product under consideration" (by which Canada appears to mean the product under investigation --- in this case, softwood lumber) too broadly. Canada cites no provision of the AD Agreement governing the way in which an investigating authority defines the product under investigation. Instead, it asserts the existence of an obligation to explain how different articles within the product under consideration "closely resemble each other,"[12] contends that Commerce violated that obligation, and maintains that violation of that obligation violated various articles of the AD Agreement (several of which were not identified in Canada's panel request, and none of which provide rules for identifying the product under investigation).

13. The short answer to Canada's scope argument is that there is no obligation under the AD Agreement to define the "product under consideration" in the manner Canada proposes. The absence of an obligation is demonstrated by the diverse practice of WTO Members, including Canada. Without an obligation there can be no violation.

[12] Canada First Written Submission, para. 125.

14. Furthermore, the test actually applied by Commerce in defining the scope of the product under consideration in this case was clearer and more detailed than the vague "close resemblance" test that Canada proposes. In determining whether particular products were properly within the scope, Commerce considered (1) the general physical characteristics of the product, (2) the expectations of the ultimate purchaser, (3) the ultimate use of the product, (4) the channels of trade in which the product is sold, and (5) the manner in which the product is advertised and displayed. With respect to the particular softwood lumber products that Canada claims should have been excluded – Western Red Cedar, Eastern White Pine, softwood lumber boards used in bed frames, and softwood lumber boards used in finger-jointed flangestock – Commerce evaluated the five factors and found the resemblances to other examples of softwood lumber sufficiently great to preclude subdivision into multiple products under consideration.

15. Canada's third claim is that, in comparing normal value to export price, Commerce violated Article 2.4 of the AD Agreement by not adjusting for differences in the dimensions of softwood lumber. The Panel should reject this claim, because Canadian respondents failed to show that differences in the dimension of the softwood lumber compared in this case affected price comparability. Commerce's decision not to make due allowance absent such a showing did not violate Article 2.4.

16. Article 2.4 requires that, in comparing export price and normal value, an investigating authority make "[d]ue allowance" for certain differences in the particular products being compared. The requirement to make due allowance applies only to "differences which affect price comparability," and the determination whether to make due allowance is to be made "in each case, on its merits." Other panels have explained that due allowance for physical or other differences that affect price comparability is not automatic.[13] Any claimed adjustment must be established on a case-by-case basis and is warranted only to the extent the differences affect price comparability.

17. In this case, the evidence made available to Commerce did not substantiate an adjustment for dimensional differences. Commerce did take dimensions – along with eight other categories of physical traits – into account in developing "matching" criteria (*i.e.*, criteria for determining which articles to compare in the first place). Applying these criteria, Commerce compared transactions with identical product characteristics wherever possible. Where an identical match was not available for a given transaction, Commerce relied on a transaction with the next most similar product characteristics. This process minimized product physical differences, including dimensional differences, in the transactions being compared. Ultimately Commerce concluded that "there appears to be little, if any difference in home market prices that is attributable to

[13] *See, e.g.*, Panel Report, *European Communities–Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings From Brazil*, WT/DS219/R, circulated Mar. 7, 2003, para. 7.158 ("*EC–Pipe Fittings*"); Panel Report, *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey*, WT/DS211/R, adopted Oct. 1, 2002, para. 7.352.

differences in dimensions of the products compared, especially where those dimensional differences were minor."[14]

18. In stark contrast to the investigating authority in *Argentina—Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles From Italy*,[15] a case on which Canada relies heavily,[16] the investigating authority in the present case sought and evaluated extensive data regarding many physical characteristics, including dimensional differences. However, the Canadian respondents failed to make the requisite showing that the dimensional differences affected price comparability. Therefore, under Article 2.4, Commerce was not required to make any adjustment for such differences.

19. Canada's fourth claim is that, in combining individual dumping margins to determine an overall dumping margin, Commerce did not properly take account of non-dumped products, inconsistent with Articles 2.4 and 2.4.2 of the AD Agreement. The Panel should reject this claim, because Articles 2.4 and 2.4.2 do not address the manner in which particular model-specific or level-of-trade-specific dumping margins, for example, are combined to determine an overall dumping margin. Moreover, by arguing that the phrase "all comparable export transactions" refers to "[a]ll sales of goods falling within the scope of an investigation,"[17] Canada deprives the term "comparable" in Article 2.4.2 of any meaning, instead making it equivalent to the term "all," which immediately precedes it.

20. The comparison obligations contained in Article 2.4.2 are "[s]ubject to the provisions governing fair comparison in paragraph 4." Thus, Article 2.4 provides explicit context for the methods for establishing the existence of dumping under Article 2.4.2. This context means that, under the instruction in Article 2.4.2 to compare "weighted average normal value with a weighted average of prices of all comparable export transactions," not all export transactions will be equally comparable with all normal value transactions. Consequently, once the comparison has been identified pursuant to Article 2.4, it would be improper to compare a weighted average normal value with respect to one model or one level of trade to a weighted average of prices for a different model or different level of trade. Yet, Canada's prescription for combining particular dumping margins for purposes of developing a single, overall dumping margin would require precisely that, contrary to Articles 2.4.2 and 2.4.

21. That Articles 2.4.2 and 2.4 do not mandate a particular method for combining model-specific, level-of-trade-specific individual dumping margins to establish a single, overall margin is corroborated by the negotiating history of the AD Agreement. The negotiating history

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[14] *Final Determination*, Comment 8 (Exhibit CDA-2).

[15] Panel Report, *Argentina–Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles From Italy*, WT/DS189/R, adopted Nov. 5, 2001.

[16] *See e.g.*, Canada First Written Submission, para. 150.

[17] *Id.*, para. 171.

demonstrates that the question whether to address the methodology at issue here was squarely presented to the negotiators, and that the text was not modified (as compared to the AD Agreement's predecessor, the GATT Antidumping Code) to prohibit this methodology. Further, the negotiating history demonstrates that insertion of the word "comparable" into Article 2.4.2 was intended precisely to ensure that the term "all" not be interpreted as implying that average export price is to be established on the basis of sales both within and outside of the category of comparison.

22. Canada's claim relies exclusively on the Report of the Appellate Body in *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India* ("*EC–Bed Linen*").[18] The United States was not a party to that dispute and is not bound by the report in that matter. As the Appellate Body has explained, dispute settlement reports "are not binding, except with respect to resolving the particular dispute between the parties to that dispute."[19] Moreover, the Appellate Body Report in *EC-Bed Linen* did not address several of the textual arguments presented by the United States in this matter. That is additional reason not to treat that report as dispositive.

23. Finally, Canada makes six company-specific claims, five of which relate to Commerce's calculations of cost of production and constructed normal value, and one of which relates to Commerce's denial of a claim for an adjustment for differences in terms and conditions of sale. These claims improperly urge the Panel to adopt alternative evaluations of the facts, rather than demonstrate that Commerce improperly established the facts or evaluated them in an unbiased and non-objective way.

24. Commerce computed cost of production for individual softwood lumber articles for purposes of (a) determining whether sales in the Canadian domestic market were made at prices below cost of production, and (b) computing normal value, in accordance with Article 2.2 of the AD Agreement, when there were no sales of softwood lumber in the Canadian domestic market or when such sales did not permit a proper comparison. In computing these costs, Commerce included reasonable amounts for administrative, selling and general costs, as provided under Articles 2.2 and 2.2.1.1.

25. Canada argues that in calculating general and administrative costs, Commerce violated Articles 2.2, 2.2.1, 2.2.1.1, 2.2.2, and 2.4 of the AD Agreement. Many of Canada's arguments erroneously assume that Commerce applied its standard cost calculation methodologies to individual lumber producers without determining the appropriateness of these methodologies in

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[18] WT/DS141/AB/R, adopted Mar. 12, 2001.

[19] Appellate Body Report, *Japan–Taxes on Alcoholic Beverages*, WT/DS8, 10, 11/AB/R, at 14, adopted Nov. 1, 1996 ("*Japan–Alcoholic Beverages")* (footnote omitted); *see also,* Appellate Body Report, *United States–Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/RW, adopted Nov. 21, 2001 paras. 107-09 (extending the reasoning of *Japan–Alcoholic Beverages* to Appellate Body reports); Panel Report, *Argentina-Poultry*, para. 7.41 (panel not bound by adopted WTO panel reports).

light of the circumstances of each producer. However, as discussed at length in the *Final Determination*, Commerce only applied its standard methodologies after careful consideration of the facts in each case.

26. As a general matter, Canada's claims that Commerce's calculations of normal value violated Article 2.4 of the AD Agreement are misplaced. Article 2.4 relates to a fair comparison between normal value and export price *once normal value has been properly determined.* Article 2.4 does not relate to what is at issue here – *i.e.*, the proper determination of normal value in the first instance.[20]

27. In calculating cost of production for Abitibi, Commerce allocated financial costs (*i.e.*, interest on borrowed funds) based on cost of goods sold (the same allocation method used for all respondents). Commerce made this allocation after considering Abitibi's arguments that its lumber producing division was less asset-laden than its other divisions. Commerce used a cost-of-goods-sold allocation, rather than the allocation urged by Abitibi, because the cost-of-goods-sold allocation better reflected the fact that financial costs are general costs, relating to the overall cash needs of the company as whole. Also, Commerce determined that its method better accounted for the fact that money is fungible – that is, that borrowed funds may be used to purchase assets or fund ongoing operations. Moreover, Commerce's allocation method accounted for differing asset values, inasmuch as more asset-laden divisions would have higher depreciation expenses, which would increase the cost of goods sold for those divisions, resulting in a proportionately greater allocation of financial cost than to less asset-laden divisions.

28. In calculating cost of production for Tembec, Commerce determined a reasonable amount for general and administrative cost based on Tembec's books and records that were shown to be in accordance with Canadian generally accepted accounting principles (GAAP), consistent with Article 2.2.1.1 of the AD Agreement. Canada argues that instead of relying on Tembec's books and records, Commerce should have relied on a separate statement of division-specific costs. However, as that separate statement was unaudited and never shown to be in accordance with Canadian GAAP, Commerce appropriately declined to rely on it. Finally, general and administrative costs are, by definition, company-wide costs, rather than costs attributable to a particular product or division. Thus, it was proper for Commerce to rely on Tembec's company-wide books and records, rather than a separate, division-specific statement.

29. In calculating cost of production for Weyerhaeuser Canada, Commerce included within general and administrative costs an apportioned amount of litigation settlement costs reported in the books and records of the company's parent, the Weyerhaeuser Company. Canada argues that these costs related to production of goods other than softwood lumber and, therefore, should not have been allocated to the cost of producing softwood lumber. However, litigation costs are quintessential general costs, relating to a company as a whole. In this case, the litigation costs

[20] *See* Panel Report, *EC–Pipe Fittings*, para. 7.140.

were incurred years after production of the good at issue (hardboard siding) and could not reasonably be considered a cost of producing that good. Indeed, Weyerhaeuser Company's own audited financial statement treated these costs as general costs. Thus, it was appropriate under Articles 2.2, 2.2.1, and 2.2.1.1 for Commerce to allocate a portion of Weyerhaeuser Company's company-wide legal costs to Weyerhaeuser Canada's cost of producing softwood lumber.

30. In calculating respondents' costs of production of softwood lumber, Commerce treated sales of wood chips (a by-product in the production process) as an offset, reducing a given respondent's total cost of production. Canada claims that Commerce erred in its calculation of the wood chip offset for respondents West Fraser and Tembec. In both cases, Commerce's calculation was consistent with Articles 2.2, 2.2.1, and 2.2.1.1 of the AD Agreement and should be upheld.

31. In the case of West Fraser, the issue for Commerce was how to measure sales of wood chips by the company to affiliated companies. To determine whether sales to affiliates reflected market prices for wood chips, Commerce compared those sales to West Fraser's sales to non-affiliated entities, as recorded in West Fraser's records. Commerce found that West Fraser's sales to non-affiliated entities were at market prices and that these sales, therefore, represented an appropriate benchmark for determining whether sales to affiliated entities were at market prices. Applying this benchmark, Commerce found certain of West Fraser's sales to affiliated entities (in Alberta) to be at market prices, and relied in part on those sales in calculating the offset. Commerce found other sales to affiliated entities (in British Columbia) not to be at market prices, and made adjustments based on the benchmark of non-affiliated sales. Consistent with Article 2.2.1.1, Commerce made its calculation based on data from the producer's own records.

32. In the case of Tembec, the issue was how to measure the value of transfers of wood chips between divisions within the company. Commerce analyzed the wood chip sales transactions between Tembec's sawmills and its pulp mill division to evaluate whether the internally set transfer prices were reasonable. Commerce found that prices recorded in Tembec's books for the transfer of wood chips between Tembec divisions reasonably reflected the actual cost of producing wood chips and, therefore, consistent with Article 2.2.1.1, relied on those prices in establishing a wood chip offset for Tembec.

33. Finally, Canada argues that Commerce failed to properly account for profits from respondent Slocan's sales of lumber futures contracts. In Commerce's investigation, Slocan requested two directly contradictory treatments for these profits. First, Slocan asked that the profits be treated as an offset to direct selling expenses in the U.S. market, as an adjustment for the conditions and terms of sale. Alternatively, Slocan asked that the profits be treated as an offset to financing costs in the calculation of cost of production. However, as Commerce found, Slocan's futures contract profits were not directly related to any particular sales of softwood lumber and, therefore, were not an appropriate basis for adjustment under Slocan's first theory. On the other hand, since the profits amounted to sales revenue (albeit, not *direct* sales revenue),

they would not have been an appropriate basis for offsetting cost of production. As Slocan failed to substantiate an offset under either theory, Commerce properly declined to grant an offset.

34. For the foregoing reasons, the Panel should reject Canada's claims in their entirety.