

ANNEX D
REQUEST FOR THE ESTABLISHMENT
OF A PANEL

Contents		Page
Annex D	Request for the Establishment of a Panel – Document WT/DS264/2	D-2

ANNEX D

REQUEST FOR THE ESTABLISHMENT OF A PANEL

WORLD TRADE ORGANIZATION

WT/DS264/2
9 December 2002

(02-6815)

Original: English

UNITED STATES – FINAL DUMPING DETERMINATION ON SOFTWOOD LUMBER FROM CANADA

Request for the Establishment of a Panel by Canada

The following communication, dated 6 December 2002, from the Permanent Mission of Canada to the Chairman of the Dispute Settlement Body, is circulated pursuant to Article 6.2 of the DSU.

The United States initiated anti-dumping proceedings against imports of softwood lumber from Canada on 23 April 2001. The Notice of Initiation was published on 30 April 2001 in the US Federal Register, Volume 66, pages 21328 *et seq.* The investigation was conducted under the US anti-dumping statute (the *Tariff Act of 1930*, as amended: 19 U.S.C. section 1763 *et seq.*) and the related regulations of the United States Department of Commerce (Commerce) (19 Code of Federal Regulations 351–357). On 21 March 2002, Commerce announced its Final Determination, which was published on 2 April 2002, in the US Federal Register, Volume 67, pages 15,539 *et seq.* Following a final affirmative injury determination by the US International Trade Commission, Commerce published in the Federal Register on 22 May 2002 an amended Final Determination and an Anti-dumping Order on softwood lumber products from Canada (Volume 67, pages 36,067 *et seq.*). Commerce's methodologies and determinations that form the bases of its Final Determination are set out in more detail in its underlying decision memoranda, including but not limited to its Issues and Decision Memorandum dated 21 March 2002 and its Scope Memorandum dated 12 March 2002. As a result of violations of the World Trade Organization (WTO) agreements described below, Commerce determined margins of dumping for imports of softwood lumber from Canada.

On 13 September 2002, the Government of Canada requested consultations with the Government of the United States, concerning the final affirmative determination of sales at less than fair value with respect to certain softwood lumber products from Canada (Inv. No. A-122-838) announced by Commerce on 21 March 2002 pursuant to section 735 of the *Tariff Act of 1930*, as amended on 22 May 2002 (Final Determination) and concerning Commerce's initiation of the

investigation and its conduct of the investigation. This request (WT/DS264/1) was made pursuant to Article 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU), Article XXII of the *General Agreement on Tariffs and Trade 1994* (GATT 1994) and Article 17 of the *Agreement on Implementation of Article VI of GATT 1994* (*Anti-Dumping Agreement*).

Canada and the United States held consultations on 11 October 2002 covering the initiation of the investigation, the conduct of the investigation and the Final Determination. These consultations failed to settle the dispute.

Canada therefore requests, pursuant to Articles 4 and 6 of the DSU, Article XXIII of the GATT 1994 and Article 17 of the *Anti-Dumping Agreement*, that a panel be established at the next meeting of the Dispute Settlement Body, to be held on 19 December 2002. Canada further requests that the panel have the standard terms of reference as set out in Article 7 of the DSU.

The measures at issue include the initiation of the investigation, the conduct of the investigation, the Final Determination and the resulting Anti-dumping Order on Softwood Lumber from Canada. The Government of Canada considers these measures and, in particular, the determinations made and methodologies adopted therein by the United States Department of Commerce under authority of the United States *Tariff Act of 1930*, including section 732(c)(4)(E), to violate the *Anti-Dumping Agreement* and the GATT 1994 for, among others, the following reasons:

1. The application filed by the US domestic industry and the subsequent initiation of the investigation by Commerce did not comply with Article 5 of the *Anti-Dumping Agreement*, including Articles 5.1, 5.2, 5.3, 5.4 and 5.8. Specifically:
 - (a) The application submitted by the US domestic industry did not include evidence reasonably available to it, including pricing of Canadian exports to the United States, pricing of the like products sold in Canada by Canadian producers, and Canadian cost data in respect of the production in Canada of the like products. By Commerce's failure to determine whether the application contained all information reasonably available to the applicant, and by Commerce initiating the investigation where the application failed to contain evidence reasonably available to the applicant, and by Commerce's failure to terminate the investigation when Commerce became aware that the application failed to contain evidence reasonably available to the applicant, the United States violated Articles 5.2, 5.3 and 5.8 of the *Anti-Dumping Agreement*.
 - (b) The application submitted by the US domestic industry did not include sufficient evidence of dumping to justify initiation of the investigation. Commerce failed to examine the accuracy and adequacy of the evidence provided in the application and failed to reject the application in view of the lack of sufficient evidence of dumping required to justify the initiation of an investigation, and failed to terminate the investigation when it became evident that the application did not contain sufficient evidence, thereby resulting in violations by the United States of Articles 5.1, 5.2, 5.3 and 5.8.
 - (c) The *Continued Dumping and Subsidy Offset Act of 2000* (CDSOA), by requiring that a member of the US industry support the application as a condition of receiving payments under the CDSOA, made an objective and meaningful examination of industry support for the application impossible. The United States violated Articles 5.4 and 5.8 in that Commerce's initiation of the investigation was not based on an objective and meaningful examination and determination of the degree of support for the application by the domestic industry.

- (d) The initiation by Commerce was made without a proper establishment of the facts, was based on an evaluation of the facts that was neither unbiased nor objective and does not rest on a permissible interpretation of the *Anti-dumping Agreement*. Accordingly, the initiation by Commerce cannot be upheld in light of the applicable standard of review under Article 17.6.
2. Commerce erroneously determined there to be a single like product (under US law, termed "class or kind" of merchandise) rather than several distinct like products, thereby failing to assess domestic industry support in respect of each distinct like product and failing to assess the sufficiency of evidence of dumping in respect of each distinct like product, thereby resulting in violations by the United States of Articles 2.6, 4.1, 5.1, 5.2, 5.3, 5.4 and 5.8 of the *Anti-Dumping Agreement* and Article VI:1 of the GATT 1994. The like product and industry support determinations by Commerce were made without a proper establishment of the facts, were based on an evaluation of the facts that was neither unbiased nor objective and do not rest on a permissible interpretation of the *Anti-dumping Agreement*. Accordingly, the like product and industry support determinations by Commerce cannot be upheld in light of the applicable standard of review under Article 17.6.
3. In making the final determination, the United States acted inconsistently with Article VI of the GATT 1994 and Articles 1, 2.1, 2.2, 2.2.1, 2.2.1.1, 2.2.2, 2.3, 2.4, 2.4.1, 2.4.2, 2.6, and 9.3 of the *Anti-Dumping Agreement*. Specifically, Commerce improperly applied a number of methodologies based on improper and unfair comparisons between the export price and the normal value, resulting in artificial and/or inflated margins of dumping:
- (a) The United States violated Article 2 of the *Anti-Dumping Agreement*, including Articles 2.4 and 2.4.2, and Article VI:1 of the GATT 1994 by Commerce's application of the practice of "zeroing" negative dumping margins, the effect of which was to inflate margins of dumping and which, in the recommendations and rulings of the Dispute Settlement Body in an earlier dispute, was found to be inconsistent with the *Anti-Dumping Agreement*. A fair comparison was therefore not made by Commerce between the export price and the normal value and a distorted margin of dumping was calculated, thereby resulting in violations by the United States of Articles 2.4 and 2.4.2 of the *Anti-Dumping Agreement*.
 - (b) The United States violated Article 2 of the *Anti-dumping Agreement*, including Article 2.4, and Article VI:1 of the GATT 1994 by Commerce's failure, when conducting comparisons between prices of products sold in the United States and prices of products with different physical characteristics sold in the Canadian market, to make due allowance for differences that affect price comparability, including differences in physical characteristics. A fair comparison was therefore not made by Commerce between the export price and the normal value and a distorted margin of dumping was calculated, thereby resulting in violations by the United States of Articles 2.4 and 2.4.2 of the *Anti-Dumping Agreement*.
 - (c) The United States violated Article 2 of the *Anti-Dumping Agreement* including Articles 2.2, 2.2.1, 2.2.1.1 and 2.2.2, and Article VI:1 of the GATT 1994 by Commerce's failure to apply a reasonable method in calculating amounts for administrative, selling and general expenses for specific exporters, including an improper allocation of general and administrative expenses including financial expenses. A fair comparison was therefore not made by Commerce between the export price and the normal value and a distorted margin of dumping was calculated, thereby resulting in violations by the United States of Articles 2.4 and 2.4.2 of the *Anti-Dumping Agreement*.

- (d) The United States violated Article 2 of the *Anti-Dumping Agreement*, including Articles 2.2, 2.2.1, 2.2.1.1, 2.2.2 and paragraph 7 of Annex I, and Article VI:1 of the GATT 1994 by Commerce's failure to apply a reasonable method to account for revenues, including by-product and futures contract revenues, as offsets in calculating costs and export price for specific exporters. A fair comparison was therefore not made by Commerce between the export price and the normal value and a distorted margin of dumping was calculated, thereby resulting in violations by the United States of Articles 2.4 and 2.4.2 of the *Anti-Dumping Agreement*.
- (e) The methodologies, calculations, comparisons and determinations by Commerce were made without a proper establishment of the facts, was based on an evaluation of the facts that was neither unbiased nor objective and does not rest on a permissible interpretation of the *Anti-dumping Agreement*. Accordingly, the methodologies, calculations, comparisons and determinations by Commerce cannot be upheld in light of the applicable standard of review under Article 17.6.
- (f) The methodologies, calculations, comparisons and determinations by Commerce violated Articles VI:1 and VI:2 of the GATT 1994 and Article 9.3 of the *Anti-Dumping Agreement* by levying an anti-dumping duty on softwood lumber from Canada in an amount greater than the margin of any dumping.

In view of the claims set forth above, Canada considers that the United States has acted inconsistently with Article VI of the GATT 1994 and Article 1 of the *Anti-Dumping Agreement*, which only permit anti-dumping measures to be applied under the circumstances provided for in Article VI and pursuant to investigations initiated and conducted in accordance with the *Anti-Dumping Agreement*. Because the claims set forth above indicate the violations of various provisions under the *Anti-Dumping Agreement*, Article VI of the GATT 1994 and Articles 1 and 18.1 of the *Anti-Dumping Agreement* are consequently violated.

Canada requests that the Panel consider and find that the US anti-dumping measures concerning imports of softwood lumber from Canada, including the initiation, conduct of the investigation, and Final Determination and resulting Anti-dumping Order are inconsistent with the provisions of the WTO agreements, nullify or impair benefits accruing directly or indirectly to Canada under the WTO agreements, and impede the achievement of the objectives of the WTO agreements.

Canada further requests that the Panel recommend that the United States revoke the anti-dumping order in respect of softwood lumber from Canada.
