

US – SOFTWOOD LUMBER V¹

(DS264)

| PARTIES | | AGREEMENT | TIMELINE OF THE DISPUTE | |
|-------------|---------------|-----------------------------------|-----------------------------|----------------|
| Complainant | Canada | ADA Arts. 1, 2, 4, 5, 6, 9 and 18 | Establishment of Panel | 8 January 2003 |
| | | | Circulation of Panel Report | 13 April 2004 |
| Respondent | United States | | Circulation of AB Report | 11 August 2004 |
| | | | Adoption | 31 August 2004 |

1. MEASURE AND PRODUCT AT ISSUE

- **Measure at issue:** US final anti-dumping duties.
- **Product at issue:** Certain softwood lumber products from Canada.

2. SUMMARY OF KEY PANEL/AB FINDINGS²

Dumping determination

- **ADA Art. 2.4 and 2.4.2 (zeroing):** The Appellate Body upheld the Panel's (majority) finding that the US acted inconsistently with the first sentence of Art. 2.4.2 in determining dumping margins on the basis of a methodology incorporating zeroing in the aggregation of results of comparisons of weighted average normal value with a weighted average of prices of all comparable export transactions. The Appellate Body ruled in this case only on the first methodology provided for in Art. 2.4.2, first sentence, that is weighted average normal value compared with a weighted average of export prices
- **ADA Art. 2.2.1.1, 2.2.2 and 2.4 (allocation of financial expenses):** The Appellate Body reversed the Panel's legal interpretation under Art. 2.2.1.1 of the phrase "consider all available evidence on the proper allocation of costs" that an investigating authority is never required to "compare various cost allocation methodologies to assess their advantages and disadvantages" and thus reversed the Panel's finding that the United States Department of Commerce (USDOC) did not act inconsistently thereof.
- **ADA Art. 2.6 (like product):** The Panel held that the USDOC's approach to defining like product was not inconsistent with Art. 2.6: the USDOC had defined the "product under consideration" – i.e. softwood lumber products – using narrative description and tariff classification.
- **ADA Art. 2.4 (fair comparison – adjustments):** The Panel found that Canada did not establish that the United States acted inconsistently with Art. 2.4 in not granting the requested adjustment for differences in dimension, because an objective and unbiased investigating authority "could have concluded that data before USDOC did not demonstrate that the remaining differences in dimensions affected price comparability".

Initiation and subsequent investigation

- **ADA Art. 5.2 (application):** The Panel found that the Canada failed to establish that the United States had acted inconsistently with Art. 5.2. as the petitioner's application [for an investigation] contained information (i) on prices at which softwood lumber was sold when destined for consumption in Canada, (ii) on its constructed value in Canada, and (iii) on export prices to the United States, as required by Art. 5.2.
- **ADA Art. 5.3 and 5.8 (sufficient evidence):** The Panel found that the United States did not violate Art. 5.3, as an unbiased and objective investigating authority could have concluded that there was sufficient evidence on dumping in the application to justify the initiation of an investigation. It also found that the authority did not violate Art. 5.8, as there was sufficient evidence to justify initiation under Art. 5.3. It further noted that Art. 5.8 does not oblige an authority to continue to assess the sufficiency of the evidence in the application and to terminate an investigation if other information undermines the sufficiency of that evidence.

¹ United States – Final Dumping Determination on Softwood Lumber from Canada

² Other issues addressed: COP calculation – by-product offset (Art. 2.2.1.1); role of annexes to parties' submissions; terms of reference (DSU Art. 6.2); evidence not before the investigating authority (ADA Art. 17.5(ii)).

US – SOFTWOOD LUMBER V (ARTICLE 21.5 – CANADA)¹

(DS264)

| PARTIES | | AGREEMENT | TIMELINE OF THE DISPUTE | |
|-------------|---------------|------------|--------------------------------|------------------|
| Complainant | Canada | ADA Art. 2 | Referred to the Original Panel | 1 June 2005 |
| | | | Circulation of Panel Report | 3 April 2006 |
| Respondent | United States | | Circulation of AB Report | 15 August 2006 |
| | | | Adoption | 1 September 2006 |

1. MEASURE TAKEN TO COMPLY WITH THE DSB RECOMMENDATIONS AND RULINGS

- Revised anti-dumping duty determination pursuant to Section 129 of the Uruguay Agreements Act: the United States Department of Commerce (USDOC) recalculated the anti-dumping rates for the exporters, based on a transaction-to-transaction comparison (T-T comparison), as opposed to weighted average-to-weighted average comparison (W-W comparison) under ADA Art. 2.4.2, first sentence. In this connection, a negative amount (where export price was higher than normal value) was treated as “zero”.

2. SUMMARY OF KEY PANEL/AB FINDINGS

- ADA Art. 2.4.2 (dumping determination – zeroing in T-T comparisons):** Having set out that the Appellate Body's findings in the original proceedings, including the prohibition of the zeroing practice, were limited to the “W-W comparison” and did not apply to the “T-T comparison” under Art. 2.4.2, the Panel found that “the US interpretation of the first sentence of Art. 2.4.2, in the context of the T-T comparison methodology, as not precluding zeroing would seem at a minimum to be permissible”.

The Appellate Body however reversed the Panel's findings and found, instead, that the use of zeroing is not permitted under the T-T comparison methodology set out in Art. 2.4.2 because “[t]he 'margins of dumping' established under this methodology are the results of the aggregation of the transaction-specific comparisons of export prices and normal value”, and “[i]n aggregating these results, an investigating authority must consider the results of all of the comparisons and may not disregard the results of comparisons in which export prices are above normal value.”

- ADA Art. 2.4 (dumping determination – fair comparison):** As regards the requirement under Art. 2.4 that “a fair comparison shall be made between the export price and the normal value”, the Panel found that the use of the zeroing methodology at issue could not be deemed “unfair” in the context of Art. 2.4 since it had already been found to be consistent with Art. 2.4.2.

The Appellate Body reversed the Panel's finding and found that the use of zeroing under the T-T comparison methodology in the Section 129 determination was inconsistent with the “fair comparison” requirement in Art. 2.4 because it distorted the prices of certain export transactions, which were not considered at their real value, and artificially inflated the magnitude of dumping, resulting in higher margins of dumping and making a positive determination of dumping more likely.

On the above basis, the Appellate Body reversed the Panel's conclusion that the United States has implemented the DSB's recommendations and rulings to bring its measure into conformity with its obligations under the ADA.

¹ United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada