

US – SOFTWOOD LUMBER VI¹

(DS277)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	Canada	ADA Arts. 3, 12 and 17	Establishment of Panel	7 May 2003
		ASCM Arts. 15 and 22.5	Circulation of Panel Report	22 March 2004
Respondent	United States		DSU Art. 11	Circulation of AB Report
		Adoption		26 April 2004

1. MEASURE AND PRODUCT AT ISSUE

- Measure at issue: Definitive anti-dumping and countervailing duties imposed by the United States.
- Product at issue: Softwood lumber from Canada.

2. SUMMARY OF KEY PANEL FINDINGS

- ADA Art. 3.7/ASCM Art. 15.7 (threat of material injury): The Panel concluded that the International Trade Commission's ("ITC") "threat of material injury" determination was inconsistent with ADA Art. 3.7 and ASCM Art. 15.7, because, in light of the totality of the factors considered and the reasoning in the ITC's determination, an objective and unbiased investigating authority could not have made a finding of a likely imminent substantial increase in imports.
- ADA Art. 3.5 and 3.7/ASCM Art. 15.5 and 15.7 (causation): The Panel found that the ITC's causation analysis was inconsistent with ADA Art. 3.5 and ASCM Art. 15.5 because it was based upon the likely effect of substantially increased imports in the near future, which had already been found to be inconsistent with ADA Art. 3.7 and ASCM Art. 15.7.

Also, the Panel considered that the overall absence of discussion of factors other than dumped/subsidized imports potentially causing injury in the future would lead to the conclusion that the ITC determination was inconsistent with the non-attribution obligation under ADA Art. 3.5 and ASCM Art. 15.5 (i.e. injuries caused by these other factors not be attributed to the subject imports).

- ADA Art. 3.4/ASCM Art. 15.4 (injury factors to be considered): The Panel rejected Canada's claim that the ITC acted inconsistently with ADA Art. 3.4 and ASCM Art. 15.4 by failing to consider the injury factors listed in these provisions in its threat of injury determination. Although the factors to be considered in making an "injury" determination under these provisions should also apply to a "threat of injury" determination, once such an analysis has been carried out in the context of an investigation of present injury, no relevant provision in ADA Art. 3 and ASCM Art. 15 requires a second analysis of the injury factors in cases involving threat of injury. In this case, the ITC considered the relevant injury factors in the context of finding no present material injury and then took this into account in its threat of injury determination. The Panel, thus, concluded that once the ITC had properly considered the injury factors as part of its present injury analysis, it was not necessary to conduct a second consideration of these factors as part of its threat of injury analysis.

3. OTHER ISSUES²

- Standard of review (DSU Art. 11 and ADA Art. 17.6): The Panel did not resolve the question of whether the application of the general standard of review (DSU Art. 11) or the application of both the general standard (DSU Art. 11) and the special standard (ADA Art. 17.6) to the same determination would lead to differing outcomes, as it was not faced, in this case, with the situation where the existence of violation depended on the question of whether there was more than one permissible interpretation of the text of the ADA.

¹ *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada*

² Other issues addressed in this case: unsolicited *amicus curiae* submission; standard of review (DSU Art. 11 and ADA Art. 17.6); positive evidence and objective examination (ADA Article 3.1/ASCM Art. 15.1); special care in threat cases (ADA Art. 3.8/ASCM Art. 15.8); notification requirements (ADA Art. 12.2.2/ASCM Art. 22.5); ADA Art. 3.2/ASCM Art. 15.2.

US – SOFTWOOD LUMBER VI (ARTICLE 21.5)¹

(DS277)

PARTIES		AGREEMENTS	TIMELINE OF THE DISPUTE	
Complainant	Canada	DSU Art. 11	Referred to the Original Panel	25 February 2005
		ADA Art. 3	Circulation of Panel Report	15 November 2005
Respondent	United States	ASCM Art. 15	Circulation of AB Report	13 April 2006
			Adoption	9 May 2006

1. MEASURE TAKEN TO COMPLY WITH THE DSB'S RECOMMENDATIONS

- United States International Trade Commission's ("USITC") re-determination, pursuant to Section 129 of the US Uruguay Round Agreements Act², on its threat of injury finding in respect of softwood lumber imports from Canada.

2. SUMMARY OF KEY PANEL/AB FINDINGS³

- DSU Art. 11 (panel's standard of review): On the grounds that the Panel had articulated and applied an improper standard of review under DSU Art. 11, the Appellate Body reversed the Panel's finding that the United States' Section 129 determination was not inconsistent with the ADA and the ASCM. Due to insufficient "uncontested facts" on the record, however, the Appellate Body declined to complete the analysis on the substantive question of whether the United States' re-determination was consistent with the ADA and the ASCM.

In this regard, the Appellate Body, first, clarified the proper standard of review to be applied by a panel reviewing determinations of national investigating authorities: (i) in examining factual issues, "a panel must neither conduct a *de novo* review nor simply defer to the conclusions of the national authority"; and (ii) a panel must conduct a "critical and searching" analysis of the information contained in the record to see if the conclusions reached and the explanations given by the investigating authority were "reasoned and adequate". Applying this standard to the present case, the Appellate Body found that the Panel in this case had not engaged in the sufficient degree of scrutiny and failed to engage in the type of critical and searching analysis, as required by Art. 11, in light of, *inter alia*, the brevity of the Panel's analyses of various issues. In particular, it found the following "serious infirmities" in respect of the Panel's application of the standard of review: (i) the Panel's repeated reliance on the test that Canada had not demonstrated that an objective and unbiased authority could not have reached the conclusions of the USITC imposed an undue burden on the complaining party; (ii) the Panel's repeated references to the USITC's conclusions as "not unreasonable" was inconsistent with the standard of review previously articulated by the Appellate Body; (iii) the Panel failed to analyse the USITC's findings in the light of alternative explanations of the evidence; and (iv) the Panel failed to analyse the "totality of factors and evidence", as opposed to individual pieces of evidence, considered by the USITC.

- DSU Art. 21.5 panel proceedings (relationship with the original proceedings): The Appellate Body noted that although an Art. 21.5 panel is not bound by the findings of the original panel, "this does not mean that a panel operating under Article 21.5 of the DSU should not take account of the reasoning of an investigating authority in an original determination, or of the reasoning of the original panel", as Art. 21.5 proceedings are part of a "continuum of events". The Appellate Body found that given the nature of the Section 129 determination, the Panel did not err in articulating its role under Art. 21.5 by stating, *inter alia*, that the Panel "is not limited by its original analysis and decision – rather, it is to consider, with a fresh eye, the new determination before it, and evaluate it in light of the claims and arguments of the parties in the Article 21.5 proceeding".

¹ *United States – Investigation of the International Trade Commission in Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada*

² Section 129 of the US Uruguay Round Agreements Act provides the legal basis for the US to implement adverse WTO decisions by making a re-determination(s) on the issues found to be WTO-inconsistent by the Panel/AB.

³ Other issues addressed: nature of threat of material injury determination (ADA Art. 3.7/ASCM Art. 15.7); distinct standards of review for the ADA and the ASCM; AB's working procedures.