UNITED STATES - FINAL DUMPING DETERMINATION ON SOFTWOOD LUMBER FROM CANADA: A LEGAL ANALYSIS OF WTO DISPUTE

Jiya Sharma, BBA LLB, Bennett University

Complainant and Respondent

The complainant in the World Trade Organization (WTO) dispute United States — Final Dumping Determination on Softwood Lumber from Canada (DS264) was Canada. The Canadian government initiated the proceedings to challenge the United States' imposition of anti-dumping duties on imports of certain softwood lumber products from Canada.

The respondent in this dispute was the United States. The measures under challenge were imposed by U.S. administrative bodies, specifically the U.S. Department of Commerce (USDOC), which was responsible for the final affirmative determination of sales at less than fair value (dumping), and the U.S. International Trade Commission (USITC), which determined that the U.S. industry was threatened with material injury by reason of the imports.

Arguments Cited

Canada challenged the U.S. measures as violations of several articles under the WTO's AntiDumping Agreement and the General Agreement on Tariffs and Trade (GATT) 1994. The core of Canada's legal arguments centred on the following:

Violation of Anti-Dumping Agreement Articles 2.4 and 2.4.2: Canada contended that the USDOC's use of "zeroing" methodology to calculate margins of dumping was inconsistent with the requirement for a "fair comparison" between the export price and the normal value. The "zeroing" practice involved disregarding instances where export prices were above normal value (i.e., where no dumping occurred) when aggregating the overall margin of dumping. Canada argued this artificially inflated the dumping margins.

Violation of Procedural Provisions: Canada also claimed violations of various procedural articles of the Anti-Dumping Agreement (Articles 1, 2.1, 2.2, 2.6, 5.1, 5.2, 5.3, 5.4, 5.8, 6.1,

6.2, 6.4, 6.9, and 9.3) concerning the initiation, conduct, and final determination of the antidumping investigation[1].

Violation of GATT 1994: Canada alleged that the U.S. actions were inconsistent with its obligations under Article VI of the GATT 1994, which governs the application of anti-dumping duties, and Article X:3(a), which concerns the uniform, impartial, and reasonable administration of trade regulations.

The United States defended its measures, arguing that its methodologies, including "zeroing," were consistent with its domestic laws and WTO obligations.

Consultations - Whether Held or Not - If Yes What Was the Outcome

Consultations were held in this dispute. Canada requested consultations with the United States on 13 September 2002 under the urgency procedures of Article 4.8 of the Dispute Settlement Understanding (DSU).

Consultation is the first stage of the WTO dispute resolution process which gives the parties a chance to talk out the issue and come to a mutual agreement which will not involve further litigation. In this case though, the consultations did not resolve the issue. Following unsuccessful consultations, Canada requested the establishment of a panel on 6 December 2002[2]. The Dispute Settlement Body came together on January 8, 2003, at the second request from Canada which thus moved the dispute into the decisional phase.

Background & History of Case

The Canada and U.S. issue of softwood lumber has been one of the most protracted and complex issues between the two countries with roots back to 1982. At the heart of the matter is what may be described as structural differences in the timber economies of the two countries. In Canada which has large scale government ownership of timber, the provincial governments charge out what is in essence a fee for the right to harvest “stumpage fees”. In the U.S. the majority of timber land is private and what is charged is determined by the market. The U.S. wood industry has put forth that the Canadian system is in fact a form of unfair subsidy which

[1] WTO Appellate Body Report, DS264
[2] WTO DSU Article 4 & DS264 timeline

allows Canadian producers to put out product into the U.S. market at what they term artificial low prices.

The dispute has unfolded in four major phases, often referred to as Lumber I through Lumber IV, alongside multiple rounds of litigation under WTO and North American Free Trade Agreement (NAFTA) dispute mechanisms.

Table: Historical Phases of the Canada-U.S. Softwood Lumber Dispute[3]

Phase	Period	Key Actions and Outcomes
I	1982-1983	U.S. Coalition for Fair Lumber Imports filed a countervailing duty (CVD) petition. USDOC found Canadian stumpage system was not a specific, countervailable subsidy.
II	1986-1991	Second CVD petition led to a preliminary duty of 15%. A 1986 Memorandum of Understanding (MOU) was signed, requiring Canada to impose an export tax. Canada withdrew from the MOU in 1991.
III	1991-1996	USDOC imposed a 6.51% CVD. A binational panel under the CanadaU.S. Free Trade Agreement (CUSFTA) largely found in Canada's favour. A five-year Softwood Lumber Agreement (SLA) with export quotas was signed in 1996.
IV	2001-2006	Initiated after the 1996 SLA expired. USDOC imposed combined antidumping and countervailing duties exceeding 20%. Multiple parallel challenges were launched at the WTO (including DS264) and under NAFTA.[4]

The DS264 dispute arose in the context of this "Lumber IV" phase. After the 1996 agreement expired on 2 April 2001, and the two countries failed to reach a new agreement, the U.S. industry promptly filed new petitions for both anti-dumping and countervailing duties. The USDOC announced its final affirmative dumping determination on 21 March 2002, leading Canada to initiate the WTO dispute that forms the subject of this analysis.

[3] Government of Canada – Softwood Lumber History; USTR Reports
[4] USDOC Determinations (2002); USTR Reports

Dispute

The specific dispute in DS264 concerned the Final Dumping Determination on softwood lumber from Canada announced by the USDOC on 21 March 2002, pursuant to Section 735 of the U.S. Tariff Act of 1930.

The dispute played out over four main phases which are put forth as Lumber I through Lumber IV also including many rounds of court action within the WTO and North American Free Trade Agreement (NAFTA) frameworks. Canada's primary issue was with the U.S. DOC's zeroing method. In an anti-dumping study, the investigating authority examines the normal value which is typically the price in the export country's home market and also the export price for each transaction[5]. In the "weighted average to weighted average" method the U.S. DOC calculated margins for different product groups (i.e. types and dimensions of lumber). In a given category if the weighted average export price went over the weighted average normal value (which means there was no dumping in that category) the USDOC would put that margin at zero "zeroing" instead of a negative number when they aggregated to determine the total dumping margin for the product and exporter in question.

Canada put forth that this practice distorts the calculation by ignoring instances of no dumping which in turn artificially raised the total dumping margin. This in turn made for a finding of dumping and a higher duty which in their view was a very likely outcome. Also, what the Canadian's put forward is that this is at odds with Article 2.4.2 of the Anti-Dumping Agreement which requires you to compare a weighted average normal value with a weighted average of all related export transactions.

Panel & Appellate Body Findings and Proceedings

The dispute underwent a full panel process, an appeal, and subsequent compliance proceedings, as the initial resolution was not immediately implemented to Canada's satisfaction.

Original Panel and Appellate Body Proceedings

Panel Establishment and Findings (2003-2004): The Panel was established on 8 January 2003, and its report was circulated on 13 April 2004. The Panel largely found in Canada's favour on

[5] WTO Appellate Body Report, US – Softwood Lumber V (DS264), para references

the key "zeroing" issue. It concluded that the USDOC's use of zeroing in the weighted averageto-weighted average comparison was inconsistent with Article 2.4.2 of the Anti-Dumping Agreement. However, the Panel rejected all of Canada's other claims. It is noteworthy that one panellist issued a dissenting opinion regarding the finding on zeroing.

Appellate Body Report (2004): The United States appealed the Panel's finding on zeroing. The Appellate Body report was circulated on 11 August 2004. The Appellate Body upheld the Panel's finding that the U.S. had acted inconsistently with the Anti-Dumping Agreement by using the zeroing methodology. This finding became a significant precedent in WTO antidumping jurisprudence on zeroing. The DSB adopted the Appellate Body and the modified Panel report on 31 August 2004.

Compliance Proceedings (Article 21.5 DSU)

Compliance Panel (2005-2006): As the United States did not bring its measure into full conformity, Canada requested the establishment of a compliance panel on 19 May 2005. The U.S. attempted to comply by recalculating the dumping margins using a different methodology permitted under Article 2.4.2—the "transaction-to-transaction" comparison method. However, the USDOC continued to use zeroing in this new methodology.

The Compliance Panel, in its report circulated on 3 April 2006, controversially interpreted Article 2.4.2 as permitting the continued use of zeroing under the transaction-to-transaction methodology[6]. It concluded that the United States had implemented the DSB's recommendations.

Appellate Body Report on Compliance (2006): Canada appealed this decision. The Appellate Body report, circulated on 15 August 2006, reversed the Compliance Panel's findings. The Appellate Body ruled definitively that the use of zeroing is also prohibited under the transaction-to-transaction comparison methodology set out in Article 2.4.2. It found that an investigating authority must consider the results of all transaction-specific comparisons and cannot disregard those where export prices are above normal value. It further found that zeroing under this methodology distorted prices and inflated dumping margins, thus violating the "fair comparison" requirement in Article 2.4 of the Anti-Dumping Agreement. The Appellate Body

[6] WTO Appellate Body Report (2006), DS264 Article 21.5

recommended that the DSB request the United States to bring its measure into conformity. This report was adopted on 1 September 2006.

Table: Summary of Key Legal Findings in WTO DS264

Proceeding	Key Finding on 'Zeroing'	WTO Agreement Violated	Outcome
Original Panel (2004)	Zeroing in 'weighted average-to-weighted average' comparisons is inconsistent with WTO rules.	Article 2.4.2, Anti-Dumping Agreement	Found in favour of Canada.
Original Appellate Body (2004)	Upheld the Panel's finding against zeroing.	Article 2.4.2, Anti-Dumping Agreement	Upheld Panel report: U.S. found non-compliant.
Compliance Panel (2006)	Zeroing in 'transaction-totransaction' comparisons is permitted.	None found.	Found in favour of the United States.
Compliance Appellate Body (2006)	Zeroing in 'transaction-totransaction' comparisons is prohibited.	Articles 2.4.2 and 2.4, Anti-Dumping Agreement	Reversed Compliance Panel; U.S. found noncompliant.

Reasonable Period of Time

The Dispute Settlement Understanding provides that if a measure is found to be inconsistent with WTO rules, the implementing Member must have a "reasonable period of time" to bring itself into compliance.

In the original DS264 proceeding, the reasonable period of time for implementation was set to expire on 17 December 2004. This timeline was established following the adoption of the original Panel and Appellate Body reports in August 2004. The United States was expected to remove the inconsistent "zeroing" practice and recalculate the dumping margins by this date.

Also, what was to follow was that the U.S. did not in fact do what it was supposed to, as it put forward a different method of zeroing in another setting. In August 2006 the Appellate Body's report on the compliance proceeding also brought out that which the U.S. was not living up to which was a second issue of non-compliance. The U.S. at that point was put back under reportable

terms to bring in the rulings' results which they had put off, though in detail what that "reasonable period of time" was named in the docs was not reported as the issue was soon settled via negotiation.

Conclusion & Mutually Agreed Solution

The defeat of the U.S. in the Canada's suit at the WTO in DS264 and in other related cases did not at once lead to the lifting of U.S. duties. In fact, the dispute was ultimately resolved through a mutually agreed diplomatic settlement. On 12 October 2006 the U.S. and Canada reported to the DSB that they had come to a Mutually Agreed Solution as per Article 3.6 of the DSU. That solution was the 2006 Softwood Lumber Agreement (SLA) which the two parties signed on 12 September 2006.

The key elements of the 2006 SLA were:

- Term and Stability: The agreement was set to last between seven and nine years, providing a period of stability and predictability for the industry. It was later extended for two years in 2012 before ultimately expiring in October 2015.

- Duty Relief and Refunds: The United States revoked its countervailing and antidumping duty orders. In return, Canada agreed to impose export measures (taxes and/or quotas) on softwood lumber shipments to the U.S. when lumber prices fell below a certain benchmark. Crucially, the U.S. agreed to return over USD $5 billion in duty deposits it had collected from Canadian producers.

- Dispute Settlement Mechanism: The SLA established a unique dispute settlement mechanism based around the London Court of International Arbitration (LCIA), moving disputes away from the WTO and NAFTA forums and into a binding private arbitration process.

The 2006 SLA successfully ended not only DS264 but also several other active WTO disputes (DS236, DS247, DS257, DS277, and DS311). It brought a temporary, managed-trade peace to a dispute that had persisted for over two decades. However, with the agreement's expiration in 2015 and the subsequent failure to negotiate a successor, the U.S. resumed the imposition of anti-dumping and countervailing duties on Canadian softwood lumber, leading to a new round of litigation and tensions, demonstrating the intractable nature of the underlying issues[7].

[7] Johnston CMT and Parajuli R, "What's next in the U.S.-Canada Softwood Lumber Dispute? An Economic Analysis of Restrictive Trade Policy Measures" (2017) 85 Forest Policy and Economics 135

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