

**Session 5:
Selected Trade Remedy Cases**

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The Conference Board of Canada

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President
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Complainant:
Canada

Respondent:
United States

**U.S.- Softwood Lumber V
DS264**

Agreements Cited:
ADA Arts. 1, 2, 4, 5, 6, 9 and 18

Timeline of Dispute

- Establishment of Panel - 8 January 2003
- Circulation of Panel Report - 13 April 2004
- Circulation of AB Report - 11 August 2004
- Adoption - 31 August 2004

Measure at Issue:
U.S. final anti-dumping duties.

Complainant:
Norway

Respondent:
European
Communities

**E.C. – Salmon
DS337**

Agreements Cited:

*GATT Arts. VI:2
ADA Arts 2.1, 2.2, 2.2.1,
2.2.1.1, 2.2.2, 2.2.2(ii),
2.6, 3.1, 3.2, 3.4, 3.5, 3.6,
4.1, 5.4, 6.2, 6.4, 6.8,
6.9, 6.10, 9.1, 9.2, 9.3,
9.4(i), 9.4(ii), 12.2 & 12.2.2,
Annex II paras 1, 3 & 6.*

Measure at Issue:
E.C. definitive final countervailing duty determination

Timeline of Dispute

- Establishment of Panel – 22 June 2006
- Circulation of Panel Report – 16 November 2007
- Circulation of AB Report – N/A
- Adoption – 15 January 2008

Complainant:
India

Respondent:
European
Communities

**E.C. – Bed Linen
DS141**

Agreements Cited:

*ADA Arts. 2, 3, 5, 12 and 15
DSU Art. 6.2*

Measure at Issue:
Definitive anti-dumping duties imposed by the European Communities, including the European Communities' zeroing method used in calculating the dumping margin.

Timeline of Dispute

- Establishment of Panel – 27 October 1999
- Circulation of Panel Report – 30 October 2000
- Circulation of AB Report – 1 March 2001
- Adoption – 12 March 2001



Complainant:
Japan

Respondent:
United States

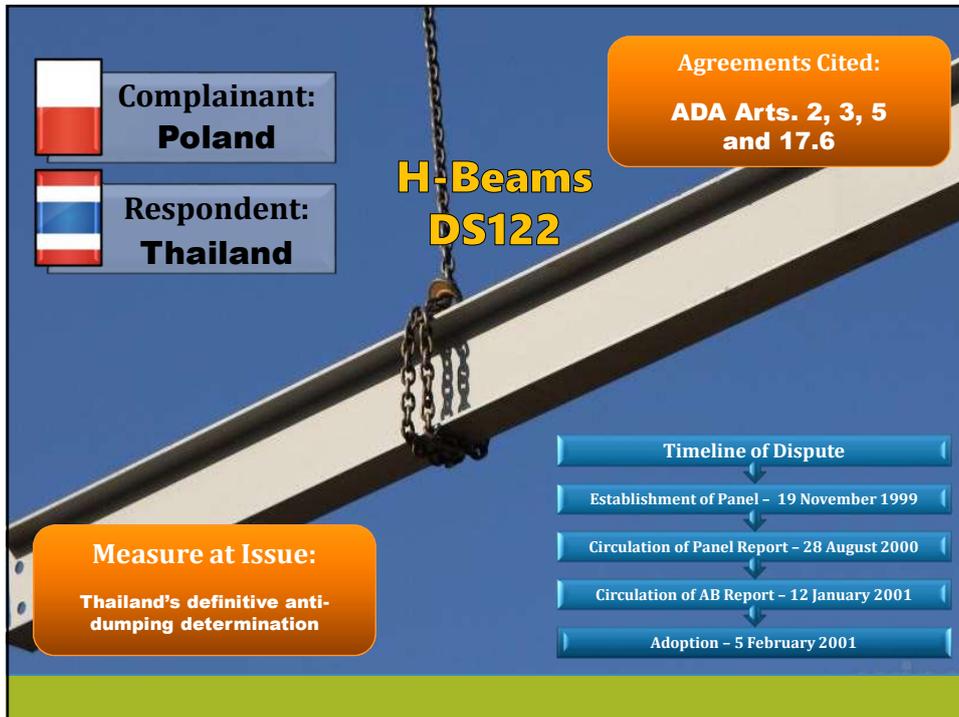
Agreements Cited:
ADA Arts. 2, 3, 6 and 9

U.S. – Hot-Rolled Steel DS184

Measure at Issue:
U.S. definitive anti-dumping duties on certain imports

Timeline of Dispute

- Establishment of Panel – 20 March 2000
- Circulation of Panel Report – 28 February 2001
- Circulation of AB Report – 24 July 2001
- Adoption – 23 August 2001



Complainant:
Poland

Respondent:
Thailand

Agreements Cited:
ADA Arts. 2, 3, 5 and 17.6

H-Beams DS122

Measure at Issue:
Thailand's definitive anti-dumping determination

Timeline of Dispute

- Establishment of Panel – 19 November 1999
- Circulation of Panel Report – 28 August 2000
- Circulation of AB Report – 12 January 2001
- Adoption – 5 February 2001

U.S. – Softwood Lumber V

- Lack of Object and Purpose in ADA
 - Important for interpretation – Vienna Convention on Law of Treaties (VCLT)
 - VCLT Plain meaning of the words in context of “Object and Purpose”
 - No preamble in 1994 ADA –
 - AB did not address object and purpose
 - Article VI: 2 – in order to offset or prevent dumping, a contracting party may levy ...



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Calculation of Normal Value

U.S. – Hot-Rolled Steel

Four conditions for selecting sales:

- In the ordinary course of trade;
- Of like product;
- Destined for consumption in country of export; and
- Price must be 'comparable'.



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Article 2.1 – Volume of Dumped Imports

E.C. – Bed Linen

- Stands for examination of the effects of volume of dumped imports from all producers or exporters dumping from country as a whole.
- Limiting analysis would breach article requirements to use positive evidence and conduct an objective examination – and fair comparison.



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Article 2.2

U.S. – Softwood Lumber V

- Article 2.2 not relevant to 2.4.2 on zeroing under transaction to transaction methodology.
- Product can be subdivided into various product types and models.
- Zeroing analysis is undertaken after Normal Values are determined.
- Some comparisons may be price-to-price. Others may be constructed values to export price.



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Article 2.2.1 – Sales Below Cost – Ordinary Course of Trade

U.S. – Hot-Rolled Steel

2.21 – demonstrates how sales below cost may be in ordinary course of trade.

- No more than 20% below sales below cost.
- Sales above weighted net average cost for POI.
- Does not deal with related parties - where sales above cost may not be in ordinary course of trade, but deemed unreliable.

U.S. – Softwood Lumber V

- Consider all available evidence on proper allocation of costs.
- Consider means -- “look at attentively”, “reflect on or to weight merits of”

U.S. – Hot-Rolled Steel (Sales Below Cost – ordinary course of trade)

- This is what investigating authority must do with all available evidence.
- “Reviewing”, “taking note” is not enough.
- Proper allocation suggests some degree of deliberation.
- Not required to compare methodologies but obligations to consider may be required to compare in order to ensure “proper allocation” of costs.



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Article 2.2.1.1 – Reasonably reflect the cost of production

U.S. – Softwood Lumber V

- “Consider all considerations on proper allocation.”
- Even-handedness.
- Matter of law – legal characterization of facts.
- AB says issue is not beyond scope of appellate review.



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Article 2.2.2 (ii) – Calculation of “weighted average”

E.C. – Bed Linen

- The clause anticipates the cost of data from more than one exporter.
- The information for GS&A and profit can only be used if there is more than one exporter.
- Members not allowed to exclude sales not made in the ordinary course of trade from calculation of weighted average under 2.2.2 (ii).



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Article 2.4 – Fair Comparison

U.S. – Hot-Rolled Steel

- First sentence is an independent obligation.
- “A fair comparison shall be made between the export price and the normal value”.
- In making fair comparison Article 2.4 mandates that due account be taken if differences which affect price comparability such as differences in the levels of trade, at which Normal Value and Export Price are calculated.

U.S. – Softwood Lumber V

- 2.42 – Transaction to transaction analysis subject to fair comparison allegation. Fair - means impartial, even-handedness or lack of bias.

U.S. – Zeroing

- Zeroing reduces the prices of undumped transactions.
- Export prices are treated as less than they really are.
- Zeroing tends to result in higher dumping margins – this is not impartial.



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Article 2.4 – Third Sentence

U.S. – Zeroing (E.C.)

“Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability.”

- Allowances should not be made for factors for which do not affect price comparability.
- Adjustments or allowances made in differences between export transaction and domestic transactions. Such as; zeroing cannot be adjustments or allowances covered by the third sentence of Article 2.4 – Including it's “a contrario”^{*} application whether or not a factor affects the price comparability between export and domestic transactions should be determined before the comparison is made, and not after.

^{*}Denotes any proposition that is argued to be correct because it is not disproven by a certain case.



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Article 2.4.2 – Calculation of Margin of Dumping – “Zeroing”

E.C. – Bed Linen

- Margin may only be established for the product as a whole.
- There can be margins for individual products – within the universe.
- Zeroing did not permit proper weighted average comparison of all normal values with all export prices.
- Multiple averaging was not an issue in Bed Linen. It is not prohibited.

U.S. – Softwood Lumber V

- Can use models of products within the scope to establish Normal Values and Export Prices.

U.S. – Zeroing (E.C.)

- Take account of differences affecting price comparability – levels of trade.
- Article 2.4.2 is not “Lex specialis”.
- Subject to/governed by Article 2.4.
- Introductory clause to 2.4.2 – notes “subject to the provisions governing fair comparison in paragraph 4”.



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Article 2.6 – Definition of “like product”

“...a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.”

This has never been an issue of contention in the cases addressed.

Source: Anti-Dumping Agreement, Article 2.6



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Article 3.1 – Over-Arching Substantive Obligation

“A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.”

Thailand – H-Beams

- Article 3.1 concerns determination of volume of dumped imports and effect (3.2).
- Imports from more than one country (Article 3.3), impact on domestic industry (3.4), impact of non-dumping factors (3.5), assessment of the domestic production of like product (3.6) and threat of injury (3.7 and 3.8)
- Focus of Article 3 is a substantial obligation related to determining injury

Source: Anti-Dumping Agreement, Article 3.1



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Article 3.1 – Objective Examination

U.S. – Hot-Rolled Steel

- Relates to investigation process.
- Article 3.1 requires an “Objective examination” of positive evidence.
- Evaluation must be even-handed.
- Even-handed examiners cannot conduct an investigation so it is more likely to result in injury finding.



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Article 3.1 – Positive Evidence

U.S. – Hot-Rolled Steel

Thailand – H-Beams

- Investigation involves the collection of both confidential and non-confidential information.
- Decision had to be based on totality of the evidence not selected evidence to support an affirmative finding.
- “Positive evidence” is a requirement about the quality of the evidence.
- Positive evidence must be affirmative, objective, verifiable and credible.



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Article 3.1/3.2 – Calculating “volume of dumped imports” and Examining Each Producer – Exporter

E.C. – Bed Linen

- Sampling as an issue.
- Evidence of dumping by examined producer – positive evidence for non-examined exporter.
- E.C. was not objective – assumed imports from non-examined exporters were dumped.
- This was not unbiased, even-handed, or fair.
- When there is sampling under Article 6.2 – difficult to conceive of a determination based on “positive” evidence and objective examination that is extrapolated from evidence from specified exporters.



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Article 3.3 – Cumulative Assessment

E.C. – Bed Linen

- Cumulative assessment under article 3.3 does not absolve obligations under Articles 3.1 and 3.2 to determine volume based on positive evidence and objective examination.
- Logic is that domestic industry experiences impact of totality of dumped imports.
- Does not need to be a cumulation of country-specific affirmative findings.
- CITT says it considers imports “en masse”.



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Article 3.4 – Evaluation of Injury Factors

Thailand – H-Beams

- Each of the 15 factors in Article 3.4 must be examined.

Actual and potential decline in sales	Magnitude of the margin of dumping
Profits	Actual and potential negative effects on cash flow
Output	Inventories
Market share	Employment
Productivity	Wages
Return on investments	Growth
Utilization of capacity	Ability to raise capital or investments
Factors affecting domestic prices	

U.S. – Hot-Rolled Steel

- Examination must be an objective investigation.
- To be objective must be even-handed.
- Can differentiate between captive and market consumption.



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Article 3.5 – Non-Dumping Factors

Must consider collective effects of all “Other known factors”, otherwise injury from other factors could be attributed to dumping.

U.S. Hot-Rolled Steel

- Must assess non-dumping factors separately and distinguish them from dumping factors without separate analysis – cannot conclude injury due to dumping.
- Dumping and non-dumping factors must apply at same time.

E.U. Bed Linen

Softwood Lumber VI

- Injury must be through effects of dumping.
- Non-dumped imports cannot be attributed to dumping.



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Article 3.7 – Threat of Material Injury

U.S. – Softwood Lumber VI

- Standards for threat are not lower or more deferential means for material injury.
- Totality of factors must lead to conclusion of existence of threat.
- Rate of increase in imports.
- Very often there is no prescribed methodology.
- Positive evidence, objective examination.
- Threat finding may not be based in allegation, conjecture or remote possibility.



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Article 5.8 – Termination

U.S. – Softwood Lumber V

Immediate termination of investigation is required if:

- Margin is “de minimis” (<2%); or
- Volume of dumped goods is negligible (<3%).



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Article 6 – Evidentiary Rules

Sets out rights to provide evidence, for disclosure and defence, treatment of confidential information.

E.C. – Bed Linen

- Article 6 – on evidence applies to evidence as it occurs throughout the AD agreement.
- Provide for due process rights/natural justice and procedural fairness.

Is opportunity to present evidence unlimited?

U.S. – Hot-Rolled Steel

- No deadlines in Article 6 – but time limits can be established.
- Absolute minimum 30 days.
- Authorities must be able to control the investigations.
- Extension – for cause – where practicable.
- Opportunities must end at some point.



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Article 6.2 – Right to Defend Interests

- Various investigations of tubular products.
- Must be able to provide evidence in order to defend interests.
- Is there a right to file subsequent to the filing deadline for the initial submission?
- There are limitations on flexibility due to requirements to conduct an efficient investigation.
- Extensions with cause, if time permits.



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Article 6.4 – Access to Information

E.C. – Tube or Pipe Fittings*

- Determinations may not be based only on information relevant to investigating authority.
- All information means all information relevant to all parties presenting their cases.

* Not included in principal investigations covered



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Article 6.8 and Annex II – Use of Facts Available

U.S. – Hot-Rolled Steel

- “Use of facts available” possible only if party fails to provide full response in a reasonable period of time.
- Cannot use “facts available” instead of timely filed information.
- There are limits and constraints on use of facts otherwise available
- Information should be;
 - Verifiable;
 - Appropriately submitted;
 - Timely; and
 - Proper medium should be used.

Best information available means best information available, not just any other information.



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Article 6.8 and Annex II – Timeliness of Parties' Submissions

U.S. – Hot-Rolled Steel

- One of key requirements for consideration is timely submission.
- Information filed timely – should be used.
- Reasonableness requires flexibility and balance.
- Co-operation maybe assiduous but not result in perfect information.
- Investigating authorities can expect best efforts.
- Information filed by respondent, if usable, should be relied upon.



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Article 6.10 – Sampling

E.C. – Bed Linen

- Where there are numerous potential respondents, investigation authority should rely on statistically valid samples.
- Not necessary to examine all exports.
- Appropriate treatment for producers not examined.
- If exporters file in timely manner, they should get their own margin.
- May be very burdensome:
 - Use of weighted average; and
 - Exclude zeros and facts available margins.



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Article 9 – Imposition of AD Duties

E.C. – Bed Linen

- Imposition and collection of duties is a separate phase of an investigation.
- Occurs after the determination foreseen in Article 2 (Dumping) and 3 (Injury).
- Imposition of duties is consequential of decision.
- Duties may only be collected after the completion of an investigation that establishes that there has been injurious dumping.



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Article 9.3 – Margin of Dumping

U.S. – Softwood Lumber V

- Amount of AD duty should not exceed M.O.D. established under Article 2.
- Article 9.3 sets the margin of dumping determined under Articles 2 as the ceiling for total amount of AD which can be applied.



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Articles 9.3.1 – 9.3.2: Prospective and retrospective duty assessment

U.S. – Softwood Lumber V

- Prospective Anti-Dumping Duty – refund can be claimed when duties exceed M.O.D.
- Retrospective Anti-Dumping Duty – duty is a deposit subject to confirmation or amendment administrative review.
 - Time limits – normally 12 months.
 - Not to exceed 18 months.



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Article 9.4 – “All Other” Rate

U.S. – Hot-Rolled Steel

- No specific methodology for establishing M.O.D. for those not selected for investigation.
- Maximum limit or ceiling – “shall not exceed”.
- Weighted average margin of dumping for verified exporters .
- May exclude “de-minimis” margins.
- Must exclude facts available (in whole or part) margins (Article 6.8).



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Articles 9.4 and 6.8

E.C. – Bed Linen

- Article 9.4 is an exception to 9.3. Article 9.4 seeks to prevent treatment of exporters not asked to co-operate, in a way that non-cooperative exporter influence the normal value.
- Article 9.4 comes after Article 3 determinations because it is a post-investigation issue.
- Article 9.4 – “All other” rates excludes facts available. All others rates calculated under Article 6.8.
- U.S. argued that prohibition should not apply to partial facts available .
- AB rejected this position.
- Article 6.8 – applies to partial facts available.



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Q&A and Discussion

Thank you for your participation.



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