WTO Panel Issues Mixed Decision in Softwood Lumber Dispute; Upholds US "Zeroing" Methodology

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On April 9, 2019, a World Trade Organization (WTO) dispute settlement panel issued its ruling in the most recent installment of the long-running US–Canada softwood lumber dispute. The panel's decision is notable for its approach to prior WTO panel and Appellate Body decisions as non-precedential, an issue that is at the forefront of the United States' calls for WTO reform.

In this dispute, *US – Differential Pricing Methodology*, Canada challenged the US Department of Commerce's (Commerce) affirmative final determination in its anti-dumping investigation of softwood lumber from Canada in 2017. Canada specifically challenged Commerce's application of the weighted average-to-transaction (W-T) methodology for calculating dumping margins and, in particular, Commerce's use of the so-called Differential Pricing Methodology to determine whether it is appropriate to use the W-T methodology and Commerce's use of zeroing, both of which Canada argued are inconsistent with Article 2.4.2 of the Anti-dumping Agreement (AD Agreement).[1]

The WTO panel found merit in one of Canada's arguments—that, in applying the Differential Pricing Methodology, Commerce erred in aggregating export price variations to find "a *single* pattern of export prices which differed significantly among different purchasers, regions *and* time periods." But the panel rejected Canada's other arguments, including its argument—relying on the Appellate Body's decision in *US – Washing Machines*—that the "pattern" of differential prices under Article 2.4.2 of the AD Agreement may only include export prices which "differ significantly" because they are significantly *lower* than prices to other purchasers, regions, or time periods. The panel also rejected Canada's argument that zeroing in the W-T methodology is inconsistent with the second sentence of Article 2.4.2 of the AD Agreement.

The panel's decision to reject Canada's arguments is somewhat unexpected in light of previous WTO panel and Appellate Body decisions that reached opposite conclusions, including the panel and Appellate Body decisions in *US – Washing Machines* and the panel decision in *US – Anti-Dumping Methodologies (China)*. Indeed, the panel acknowledged that its conclusions differ from prior WTO rulings; however, the panel "carefully considered these reports" and "found convincing or cogent reasons to arrive at [different] conclusions."[2] The panel's use of the phrase "cogent reasons" is a reference to the Appellate Body's guidance in *US – Stainless Steel (Mexico)* that "absent cogent

reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case."[3]

The United States issued a statement praising the panel's ruling, with US Trade Representative Robert Lighthizer saying "[t]he WTO rules do not prohibit 'zeroing'" and commending the panel "for doing its own interpretive analysis and having the courage to stand up to undue pressure that the Appellate Body has been putting on panels for years."[4] For many years, the United States has expressed concern regarding the Appellate Body's claims that its reports are entitled to "precedential effect" and are to be followed by WTO panels absent "cogent reasons."[5] This is one of the key issues the United States has cited in its calls for WTO and Appellate Body reform.[6] Since mid-2017, the current Administration has been blocking Appellate Body nominations in protest of what it sees as abuses of the WTO dispute settlement system, leaving the Appellate Body with only three out of seven members, the minimum needed to hear an appeal. The terms of two of the three remaining Appellate Body members are due to expire in December 2019.

It will be interesting to see whether the WTO panel's approach in *US – Differential Pricing Methodology*—and specifically its willingness to engage in different interpretation and reach different conclusions from the Appellate Body—contributes to a softening of the United States' position and a willingness to advance new Appellate Body nominations. Canada has already announced plans to appeal the panel's decision, but when (and whether) that appeal will be heard is unclear given the current status of the Appellate Body and impending additional vacancies.

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1. Article 2.4.2 of the AD Agreement permits the use of the W-T methodology if the investigating authority (*e.g.*, Commerce) finds "a pattern of export prices which differ significantly among different purchasers, regions or time periods."

2. Panel Report, US – *Differential Pricing Methodology*, para. 7.107.

3. Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 160.

4. *See* Press Release, USTR, *United States Prevails on "Zeroing" Again: WTO Panel Rejects Flawed Appellate Body Findings* (April 9, 2019).

5. *See* 2018 Trade Policy Agenda and 2017 Annual Report, at 22-28.

6. *See* Statement by the United States at the WTO General Council (Dec. 12, 2018).

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