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WTO Panel Report : US – Washing Machines

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Summary

Decision: A WTO Panel has issued a mixed ruling in a Korean challenge to anti-dumping and countervailing duties imposed by the United States on certain imported washing machines.

Significance of decision

This decision marks the first time that a WTO panel has ruled that it is WTO-inconsistent to use "zeroing" in an anti-dumping investigation involving alleged "targeted dumping". This had been an open issue for years, with the United States taking the strong position that the use of zeroing to address targeted dumping was permissible under the WTO Anti-Dumping Agreement. The Panel in the present case rejected this US position.

"Zeroing" refers to the practice whereby an investigating authority discounts so-called "negative dumping margins" to zero. Where the export price of a product is lower than the price in the exporting country, this creates a positive dumping margin. However, when zeroing is used, investigating authorities do not give any credit for "negative" dumping margins, i.e., when the export price of the product is higher than the price in the exporting country. The investigating authority does not average positive and negative dumping margins together – instead, it considers all negative dumping margins to be zero. This has the effect of inflating the overall average dumping margin, and can lead to the imposition or maintenance of anti-dumping duties which may not otherwise apply at all.

The WTO Appellate Body has ruled against the use of zeroing by the United States in both in original investigations and reviews. But the use of zeroing in situations of alleged "targeted" dumping remained an open question until now. "Targeted" dumping, as the Appellate Body has found, means "dumping that is targeted to certain purchasers, targeted to certain regions, or targeted to certain time periods".

The rules in the Anti-Dumping Agreement applicable to zeroing are technical, but their impact on trade is real and significant. The Panel ruling in the present case, if upheld on appeal, will limit the ability of the US Department of Commerce (USDOC) to impose anti-dumping duties in situations of alleged targeted dumping. Many WTO Members will consider that this ruling closes the one remaining loophole in the WTO jurisprudence on zeroing. This decision is also likely to influence the outcome of similar claims brought by China in United States – *Certain Methodologies and their Application to Anti-Dumping Proceedings Involving China* (DS471). That Panel will rule later this year.

In the Korean case, the reaction from the US industry has been sharp. The United Steelworkers (USW) International President issued a statement on Friday that "[t]he WTO's record of overreaching its authority is well documented. An appeal should reverse this decision. If not, the United States should seriously review whether the WTO has outlived its usefulness." The United States is indeed likely to appeal this ruling.

Report

Factual Background: Three types of zeroing

Article 2.4 of the WTO Anti-Dumping Agreement provides that a "fair comparison" shall be made between the export price and the normal value. Article 2.4.2 sets out certain rules for the calculation of a dumping margin. It sets out three basic methodologies for investigating authorities to calculate the margin of dumping:

- "Weighted average-to-weighted average": The dumping margin for an exporter is calculated by model (an individual type of the product under investigation), by comparing the weighted price of export transactions with the weighted-average normal value of the model. The results of the comparisons for all models are then aggregated and weighted, i.e., expressed as a percentage of imports;

- "Transaction-to-transaction": Prices are compared on a transaction-specific basis; and
- "Weighted average-to-transaction": An individual export transaction is compared to the weighted average normal value. Article 2.4.2 limits the application of this method to targeted dumping, i.e., if the authorities "find a pattern of export prices which differ significantly among different purchasers, regions or time periods."

In the current dispute, Korea challenged the use by the USDOC of the third methodology, i.e., weighted average to transaction to address alleged targeted dumping. Some of the key determinations of the Panel are set out below.

Methodology to "unmask" targeted dumping: USDOC breaches the Anti-Dumping Agreement

The Panel in the present case indicated that the third methodology should be used "in exceptional cases only", if "the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average to weighted average or transaction to transaction comparison".

The Panel considered that the object and purpose of the third methodology was "to enable investigating authorities to 'unmask' so-called 'targeted dumping'".

The Panel parsed this provision in Article 2.4.2 into what it considered to be three components:

- The "methodology clause", under which "an investigating authority is allowed to use an asymmetrical comparison methodology involving the comparison of a weighted average normal value with 'prices of individual export transactions'";
- The "pattern clause", which requires the existence of a "pattern of export prices which differ significantly among different purchasers, regions or time periods"; and
- The "explanation clause", which requires the investigating authority to explain why "such differences" cannot be taken into account appropriately by the use of the other, regular methodologies.

The Panel first found that the USDOC targeted dumping methodology in the Washers investigation breached the "methodology clause". It found that this methodology "should only be applied to transactions that constitute the 'pattern of export prices which differ significantly among different purchasers, regions or time periods'". However, the USDOC used the methodology "to all transactions, including transactions other than those constituting the patterns of transactions that the USDOC had determined to exist". This breached Article 2.4.2.

The Panel rejected Korea's claim that the USDOC methodology breached the "pattern clause". Korea had argued that the USDOC breached Article 2.4.2 by "determining the existence of a 'pattern of export prices which differ significantly' among purchasers, regions or time periods on the basis of purely quantitative criteria, without any qualitative assessment of the reasons for the relevant price differences". The Panel reasoned that "an authority might properly find that certain prices differ 'significantly' if those prices are notably greater – in purely numerical terms – than other prices, irrespective of the reasons for those differences".

The Panel then found the US methodology to be in violation of the "explanation clause" because "[i]n the Washers anti-dumping investigation, the USDOC failed to consider whether the factual circumstances surrounding the relevant price differences were suggestive of something other than targeted dumping".

Impermissibility of "aggregating random and unrelated price variations"

Korea also challenged the WTO-consistency "as such" of the USDOC Differential Pricing Methodology (DPM), which Korea characterized as the "underlying measure". The Panel found that the DPM violated Article 2.4.2 "as such", reasoning in part as follows:

> According to the second sentence of Article 2.4.2, one of the conditions for applying the [weighted average-to-transaction] comparison methodology is the identification of 'a pattern of export prices which differ significantly among different purchasers, regions or time periods'. In our view, the phrase 'among different purchasers, regions or time periods' determines the question of how the relevant 'pattern' must be identified. The use of the disjunctive 'or' in this phrase is significant, as its ordinary meaning indicates that a 'pattern' can only be found in prices that differ significantly either among purchasers, or among regions, or among time periods. This excludes the possibility of establishing a 'pattern' across the three categories cumulatively. We find support for this approach in the Appellate Body's previous clarification that there are 'three kinds of 'targeted' dumping, namely dumping that is targeted to certain purchasers, targeted to certain regions, or targeted to certain time periods'. The Appellate Body did not identify any other types of 'targeted' dumping.

The Panel thus found the DPM to be WTO-inconsistent as such, in part because "by aggregating random and unrelated price variations, it does not properly establish 'a pattern of export prices which differ significantly among different purchasers, regions or time periods'".

WTO-inconsistent use of zeroing in the context of the targeted dumping methodology

The Panel began its analysis of this issue by noting that "[z]eroing in the context of establishing margins of dumping using the [weighted average-to-transaction] comparison methodology occurs when the USDOC disregards (i.e. treats as 'zero') any negative dumping when the results from multiple comparisons between the weighted average normal value and each of the individual export transactions are aggregated".

The Panel acknowledged that "the second sentence of Article 2.4.2 allows an investigating authority to have particular regard to the pricing behaviour of an exporter in respect of those pattern transactions in determining the margin of dumping for that exporter". However, it stressed that "such possibility requires that the entirety of the pricing behaviour within that pattern must be taken into account. We see no basis for ignoring, or zeroing, individual pattern transactions that may be priced above normal value".

The Panel therefore concluded that the USDOC's use of zeroing when applying third methodology was WTO-inconsistent both "as such" and "as applied" in the *Washers* investigation.

Claims under the SCM Agreement

The Panel dismissed Korea's challenge to the WTO-consistency of countervailing measures imposed by the USDOC. Among other things, the Panel did not accept Korea's position that the programs countervailed by the USDOC were not "specific" under the SCM Agreement.

Note from Brendan McGivern, head of the World Trade Organization (WTO) practice of the White & Case LLP and Executive Partner of the Firm's Geneva office.

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