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NAFTA Chapter 19 Panel Follows WTO Appellate Body in Striking Down Zeroing

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I. Introduction

Earlier this year, a binational panel constituted under Article 1904(2) of the North American Free Trade Agreement (NAFTA) issued a decision in *Stainless Steel Sheet and Strip In Coils From Mexico: Final Results of 2004/2005 Antidumping Review* (*Stainless Steel Sheet*) concerning the application of the zeroing methodology by the U.S. Department of Commerce (DOC).[1] In a split decision, the panel partially remanded the matter to the DOC to recalculate the relevant dumping margins without zeroing. In the course of clarifying the *Chevron* and *Charming Betsy* doctrines in connection with U.S. anti-dumping law, the panel gave increased weight to a series of Appellate Body reports of the World Trade Organization (WTO) outlawing zeroing in a range of anti-dumping contexts.

II. Anti-Dumping Measures by WTO Members

Pursuant to Article 2.1 of the WTO's Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement), a product is dumped if its "export price . . . is less than the comparable price . . . for the like product when destined for consumption in the exporting country."[2] In other words, a product is considered dumped if the product for export is cheaper than the same product sold domestically. Although dumping is not illegal under WTO rules, it is often condemned as "unfair" trade. Accordingly, as an exception to the usual WTO disciplines of most favoured nation treatment and tariff bindings, WTO Members are permitted to impose additional anti-dumping duties on dumped imports if their authorities determine in an investigation that the dumped imports are causing material injury to the domestic industry that produces the like product. The amount of anti-dumping duties cannot exceed the degree or "margin" of dumping.

Economists generally agree that in most cases it is economically irrational for an importing country to impose anti-dumping duties, because these duties are usually passed on to the consumer in the form of higher prices, and because dumping is frequently explained by legitimate commercial considerations, such as profit maximization across different markets or the need to dispose of excess inventory. Anti-dumping duties, or some other retaliatory response, might make sense in the event of "predatory" dumping, whereby a producer or exporter drops prices in order to drive out competition in the importing country before raising prices to even higher levels than before. However, this scenario is unlikely to arise in practice. Moreover, the WTO agreements do not require Members conducting an anti-dumping investigation to make any inquiry whatsoever into the motivation for dumping, be it predatory or otherwise.

Nevertheless, in negotiating the General Agreement on Tariffs and Trade 1947 (GATT), and later the WTO, the contracting parties may have been unable to agree on major trade-liberalizing obligations, such as tariff ceilings and national treatment, if anti-dumping measures were not possible. These measures (along with other trade remedies, such as safeguards and countervailing measures) provide some flexibility to WTO Members in addressing the negative effects of trade liberalization on their domestic

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DOCUMENTS OF NOTE

WTO Agreements

Anti-Dumping Agreement

Murray v. Charming Betsy, 6 U.S. 64 (1804)

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)

ORGANIZATIONS OF NOTE

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industries, and are widely used as one of the few protectionist tools sanctioned by the WTO agreements. While the United States was once the primary user of anti-dumping measures (along with a few other developed countries), many more countries, including developing countries, have become increasingly reliant on anti-dumping over the years.

III. Zeroing under the WTO Agreements

When a government's investigating authority calculates dumping margins, it sometimes removes sales of non-dumped imports (setting them as zero values) when computing a dumping margin. In contrast, if the zeroing methodology is not used, sales of non-dumped imports are offset against sales of dumped imports, and in many cases the resulting dumping margin will be either reduced or eliminated. During the Uruguay Round leading to the creation of the WTO in 1995, the negotiators discussed zeroing and were unable to agree on whether it should be allowed, so the WTO agreements contain no explicit permission for or prohibition of zeroing. However, the WTO's Appellate Body has consistently ruled—in cases almost invariably involving the United States as respondent—that zeroing is incompatible with the Anti-Dumping Agreement. The Appellate Body's reasons for this conclusion have varied, but it has found different forms of zeroing WTO-inconsistent in all the main types of anti-dumping proceedings: original investigations, administrative reviews, and sunset reviews.[3]

Several WTO panelists have offered powerful dissenting views, and some panels have tried unsuccessfully to depart from the Appellate Body's stance.[4] One Member of the Appellate Body has supported the Appellate Body's conclusion on zeroing on the basis of precedent rather than the inherent merits of this conclusion.[5] Yet the Appellate Body has refused to accept that more than one interpretation of the Anti-Dumping Agreement may be permissible, despite recognition of that possibility in Article 17.6(ii) of the Anti-Dumping Agreement,[6] and despite the fact that only the Ministerial Conference and the General Council of the WTO are entitled to adopt authoritative interpretations of the WTO agreements.[7] The Appellate Body's intransigence may in part be motivated by suspicion of the dubious economics behind anti-dumping and its typically protectionist nature, but its position may be difficult to reconcile with the negotiating history and the absence of clarity in the text of the agreements.

WTO Members continue to debate the permissibility of zeroing in the ongoing Doha Round of trade negotiations. Although other WTO Members, such as the European Union, previously used this methodology, today the United States is one of very few Members continuing to maintain that zeroing is consistent with WTO rules. Indeed, even the United States has ceased using zeroing in certain contexts and has conceded the point in some WTO disputes.[8]

IV. The NAFTA Panel Decision

In December 2006, the DOC published its final results in an administrative review of anti-dumping duties imposed on certain steel products imported from Mexico. Using zeroing, the DOC calculated a weighted-average dumping margin of 1.16 percent for the manufacturer/exporter ThyssenKrupp Mexinox S.A. de C.V. (Mexinox) for the period July 1, 2004, and June 30, 2005.[9] Pursuant to Article 1904(2) of NAFTA, Mexinox and Mexinox USA Inc. requested that a binational NAFTA panel review the DOC's final results to determine whether they are in accordance with U.S. law. Zeroing was one of three issues raised in the dispute.

Luis Felipe Aguilar and Gisela Bolívar of Mexico and Dale Tursi of the United States were the three panelists in the majority. They determined that the U.S. common law doctrines of *Chevron*[10] and *Charming Betsy*[11] were applicable and led to the conclusion that U.S. law does not permit zeroing. The majority explained that, pursuant to *Chevron*, where "Congress has not spoken directly" to a particular issue in a given statute, a domestic agency's interpretation will be allowed "only if it is a permissible construction of the statute."[12] The majority determined that a "plain reading" of the relevant U.S. statute[13] precludes zeroing. Furthermore, pursuant to *Charming Betsy*, "an otherwise permissible interpretation . . . may nonetheless be contrary to law if it conflicts with the US's international obligations."[14] The NAFTA panel majority relied on WTO dispute settlement decisions disapproving zeroing "as authoritative interpretations available to clarify the obligations" of WTO Members.[15] In spite of the ambiguity and controversy concerning zeroing at

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the international level, the majority described its prohibition in the WTO as deriving from "the Treaty itself," rather than from reports of WTO panels or the Appellate Body.[16]

The panel majority directed the DOC to issue a final redetermination on remand, including dumping margins recalculated without zeroing, within forty-five days. At the time of writing, no such remand redetermination has been published.[17]

Two U.S. panelists, Joseph Liebman and Cynthia Lichtenstein, wrote a dissent affirming the DOC's use of zeroing. According to the dissent, the WTO agreements constitute a non-self-executing treaty, which is therefore incorporated into U.S. law by legislation: "it is Congress's legislation that is determinative of the content of United States' obligations under the treaty in question," and not the views of WTO panels or the Appellate Body.[18] They also challenged the majority's "plain reading" of the U.S. statute as prohibiting zeroing:

> [D]ecisions of the United States Court of Appeals for the Federal Circuit[19] and lower courts . . . have declared the relevant statute to be ambiguous, thus permitting Commerce [DOC] to use zeroing as its methodology in any particular determination that has not been rejected by the political authorities after an adverse WTO ruling in the particular case and a subsequent proceeding under section 129, 19 U.S.C. §3538, of the Uruguay Round Agreements Act . . .[20]

The dissent emphasized that this reasoning is consistent with *Charming Betsy*, which indicates that, in case of ambiguity, a statute should not be interpreted to violate international law "as understood in this country," or as "incorporated into United States law."[21] The dissenting panelists agreed with the majority's description of section 129 as providing a "statutorily mandated scheme for implementing WTO reports into domestic law . . . in those cases where WTO reports call for specific agency action to come into conformity with WTO obligations."[22] Accordingly, the dissent considered that the executive, rather than the judicial branch or the NAFTA panel, has discretion to determine whether and how to implement the adverse WTO reports on zeroing.

This case echoes an earlier panel decision pursuant to NAFTA Article 1904(2) in which a Canadian company challenged a final administrative review by the DOC.[23] The panel majority in that case similarly remanded the matter to the DOC to recalculate the relevant dumping margins without zeroing, but the case apparently settled before that occurred. Joseph Liebman, the only panelist common to the two cases, was among the dissenters.

V. Conclusion

The NAFTA panel ruling in *Stainless Steel Sheet* appears contrary to previous decisions of the U.S. Court of Appeals for the Federal Circuit and arguably undermines the role of Congress and the Administration in implementing adverse rulings in WTO disputes. The panel's reasoning may be affected by future pronouncements by U.S. courts on *Charming Betsy* and related issues. In the meantime, this decision validates the WTO Appellate Body's prohibition of zeroing, despite strong justifications for zeroing expressed in previous WTO panel reports, an absence of clear agreement to prohibit zeroing during the Uruguay Round of multilateral trade negotiations, and ongoing discussion in the Doha Round on the permissibility of zeroing.

About the Author

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Endnotes

[1] Article 1904 Binational Panel Review Pursuant to the North American Free Trade Agreement, *Stainless Steel Sheet and Strip In Coils from Mexico: Final Results of 2004/2005 Antidumping Review*, USA-MEX-2007-1904-01 (Apr. 14, 2010), *available at* http://www.worldtradelaw.net/nafta19/stainlessincoils-dumping-nafta19.pdf [hereinafter *Stainless Steel Sheet*].

[2] Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, 1868 U.N.T.S. 201, *available at* http://www.wto.org/english/docs_e/legal_e/19-adp_01_e.htm [hereinafter Anti-Dumping Agreement].

[3] *E.g.*, Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews, Recourse to Article 21.5 of the DSU by Japan*, WT/DS322/AB/RW (Aug. 18, 2009); Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R (Apr. 30, 2008); Appellate Body Report, *United States – Measures Relating to Zeroing and Sunset Reviews*, WT/DS322/AB/R (Jan. 9, 2007); Appellate Body Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*,WT/DS141/AB/R (Mar. 1, 2001).

[4] *E.g.*, Panel Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, ¶ 7.106, WT/DS344/R (Dec. 20, 2007, adopted as modified by the Appellate Body Report May 20, 2008); Panel Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, ¶¶ 9.12, 9.22 (dissent), WT/DS264/R (Apr. 13, 2004, adopted as modified by the Appellate Body Report Aug. 31, 2004).

[5] Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, ¶¶ 312-313, WT/DS350/AB/R (Feb. 4, 2009).

[6] Anti-Dumping Agreement, *supra* note 2, art. 17.6(ii) ("Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.").

[7] Marrakesh Agreement Establishing the World Trade Organization, art. IX:2, Apr. 15 1994, 1867 U.N.T.S. 154, *available at* http://www.wto.org/english/docs_e/legal_e/04-wto_e.htm ("The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements.").

[8] *See* Panel Report, *United States – Anti-Dumping Measure on Shrimp from Ecuador*, ¶ 4.2, WT/DS335/R (Jan. 30, 2007); Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 Fed. Reg. 77722 (Dec. 27, 2006).

[9] Stainless Steel Sheet and Strip in Coils From Mexico, Final Results of Antidumping Duty Administrative Review, 71. Fed. Reg. 76978 (Dec. 22, 2006).

[10] Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984).

[11] Murray v. Charming Betsy, 6 U.S. 64 (1804).

[12] *Stainless Steel Sheet*, *supra* note 1, at 12.

[13] 19 U.S.C. §1677 (2010).

[14] *Stainless Steel Sheet*, *supra* note 1, at 13.

[15] *Id.* at 11.

[16] *Id.* at 15.

[17] *See* Remand Redeterminations, U.S. DEP'T OF COMMERCE, INT'L TRADE ADMIN., IMPORT ADMIN., http://ia.ita.doc.gov/remands (last visited Sept. 9, 2010) (showing no remand redetermination to date).

[18] *Stainless Steel Sheet*, *supra* note 1, at 65 (Liebman & Lichtenstein, dissenting).

[19] *E.g.*,Koyo Seiko Co. v. United States, 551 F.3d 1286, 1291 (Fed. Cir. 2008), *reh'g denied, reh'g en banc*, 2009 U.S. App. LEXIS 13856 (Fed. Cir. Apr. 23, 2009); NSK Ltd. v. United States, 510 F.3d 1375 (Fed. Cir. 2007); Corus Staal BV v. United States, 502 F.3d 1370 (Fed. Cir. 2007).

[20] *Stainless Steel Sheet*, *supra* note 1, at 57 (Liebman & Lichtenstein, dissenting).

[21] *Id.* at 58-59, 66, 73, 87.

[22] *Id.* at 62.

[23] Article 1904 Binational Panel Review Pursuant to the North American Free Trade Agreement, *Carbon and Certain Alloy Steel Wire Rod from Canada: 2nd Administrative Review*, USA-CDA-2006-1904-04 (Nov. 28, 2007), *available at* http://www.worldtradelaw.net/nafta19/wirerod-dumping-nafta19.pdf.