WORLD TRADE ORGANIZATION

WT/DS534/5

5 June 2019

(19-3887)

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Original: English

UNITED STATES – ANTI-DUMPING MEASURES APPLYING DIFFERENTIAL PRICING METHODOLOGY TO SOFTWOOD LUMBER FROM CANADA

NOTIFICATION OF AN APPEAL BY CANADA UNDER ARTICLE 16.4 AND ARTICLE 17 OF THE UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES (DSU), AND UNDER RULE 20(1) OF THE WORKING PROCEDURES FOR APPELLATE REVIEW

The following communication dated 4 June 2019, from the Delegation of Canada, is being circulated to Members

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Pursuant to Article 16.4 and Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") and Rule 20 of the Working Procedures for Appellate Review, Canada hereby notifies the Appellate Body Secretariat of its decision to appeal certain issues of law covered in the report of the Panel in *United States – Anti-Dumping Measures Applying Differential Pricing Methodology to Softwood Lumber from Canada* (DS534) and certain legal interpretations developed by the Panel in that report.

First, Canada requests that the Appellate Body review the Panel's findings and conclusions arising from its erroneous interpretation of the term "pattern" in the second sentence of Article 2.4.2 of the Agreement on Implementation of Article VI of the GATT 1994 ("Anti-Dumping Agreement"). In particular, the Panel interpreted Article 2.4.2 to improperly find that a "pattern" could include export prices that are significantly higher than other export prices.[1] It then incorrectly found that the US Differential Pricing Methodology's ("DPM") inclusion of export prices that are significantly higher in the "pattern" in this dispute is consistent with Article 2.4.2 of the Anti-Dumping Agreement.

Second, Canada requests review of the Panel's erroneous finding that the second sentence of Article 2.4.2 requires an investigating authority to use the weighted-average-to-transaction methodology for "pattern" transactions and a symmetrical comparison methodology for non-pattern transactions.[2] This amalgam of comparison methodologies is inconsistent with the ordinary meaning and context of Article 2.4.2 and would undermine the function of this provision.

Third, Canada requests review of the Panel's erroneous findings and conclusions with respect to zeroing under the second sentence of Article 2.4.2 and Article 2.4 of the Anti-Dumping Agreement.[3] The Panel's finding that zeroing was permissible under the second sentence was based on an improper interpretation of Article 2.4.2. In addition, the Panel erred when it failed to find that the practice of zeroing independently violates the fair comparison requirement in Article 2.4. These erroneous findings led the Panel to improperly conclude that the United States' application of zeroing as part of the DPM in the underlying investigation was consistent with Article 2.4.2 and Article 2.4 of the Anti-Dumping Agreement.

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[1] Panel Report, *US – Differential Pricing Methodology*, paras. 7.50-7.66.
[2] Panel Report, *US – Differential Pricing Methodology*, paras. 7.85-7.100.
[3] Panel Report, *US – Differential Pricing Methodology*, paras. 7.101-7.106 and 7.108-7.112.

Fourth, Canada requests that the Appellate Body find that the Panel acted inconsistently with the function of panels under Article 11 of the DSU. In particular, the Panel erred by departing, without cogent reasons, from the legal interpretations and reasoning contained in the adopted Appellate Body report in *US – Washing Machines*. In that report, the Appellate Body set out the correct interpretation of the second sentence of Article 2.4.2 and Article 2.4 and concluded that the United States' DPM measure was "as such" WTO-inconsistent. While the Panel acknowledged the existence of the "cogent reasons" standard that arises from the text of the DSU,[4] it failed to provide any such reason that would justify departing from adopted Appellate Body legal interpretations and reasoning.

Canada respectfully requests that the Appellate Body: reverse the findings and conclusions of the Panel referred to above; complete the analysis and find that the application of the DPM to Canadian companies in the underlying investigation was WTO-inconsistent; modify accordingly the recommendations of the Panel; and find that the Panel acted inconsistently with Article 11 of the DSU.

[4] Panel Report, *US – Differential Pricing Methodology*, para. 7.107.