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Tax Alert – Canada

Canada files wide-ranging WTO Dispute Settlement Complaint against US trade remedy law practices

EY Tax Alerts cover significant tax news, developments and changes in legislation that affect Canadian businesses. They act as technical summaries to keep you on top of the latest tax issues. For more information, please contact your EY advisor or EY Law advisor.

On 10 January 2018, an official Request for Consultations document (the complaint) filed by Canada in late December was circulated to other World Trade Organization (WTO) members, the first step in the dispute settlement process. Canada claims that the US currently maintains trade remedy measures that are inconsistent with US obligations under the *WTO Anti-Dumping Agreement*, the *Agreement on Subsidies and Countervailing Measures*, the *General Agreement on Tariffs and Trade 1994* and the *Understanding on Rules and Procedures Governing the Settlement of Disputes*.

Summary of the complaint

Specifically, Canada claims that the US:

- ▶ Collects final anti-dumping and countervailing duties (AD/CV duties) in excess of WTO-consistent rates and does not refund cash deposits of AD/CV duties collected in excess of WTO-consistent rates.
- ▶ Imposes and collects retroactive provisional duties following the issuance of preliminary affirmative “critical circumstances” (massive imports in a short time frame) determinations, which is inconsistent with the *WTO Anti-dumping Agreement* and the *Agreement on Subsidies and Countervailing Measures*, which permit retroactive imposition of definitive duties only 90 days prior to a preliminary determination and provisional countervailing duties within 60 days after the date of initiation of an investigation.

- ▶ Improperly treats export controls (e.g., export permitting processes, export levies, export quotas, export restraints, export bans) on input products used or incorporated into a product under investigation as prohibited financial contributions.
- ▶ Improperly calculates benefits in countervailing duty proceedings by disregarding price comparisons that exceed a benchmark price and result in negative values.
- ▶ Unduly restricts defendants from submitting information or documents in anti-dumping and countervailing duty investigations by effectively closing the evidentiary record before the preliminary determination.
- ▶ Creates an institutional bias in the US industry's favour by allowing the International Trade Commission (USITC) "tie vote provision," a provision that deems a tie vote (i.e., 3-3 vote) to be an affirmative determination of material injury, threat of material injury to the industry of the US or material retardation of the establishment of a domestic industry in the United States.

Next steps

The filing of the complaint is the first step in the formal dispute settlement process as per Article 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU). If Canada and the US cannot find a satisfactory solution during consultations within 60 days, Article 4.7 of the DSU permits Canada to request adjudication by a dispute resolutions panel. Often, this period is extended, and other WTO members can request to participate in the consultations, which can also delay the process.

Implications

The publication of the complaint took place shortly after the US Commerce Department applied preliminary countervailing duties on Canadian exports of uncoated groundwood paper, but was filed shortly after a complaint filed by Canada specifically about the softwood lumber dispute determinations in December. It is unprecedented in its scope, as it targets US countervailing and anti-dumping rules and procedures generally. It does not focus on any one AD/CV determination and, instead, seems to challenge the US AD/CV regime as a whole on behalf of all the world's exporters.

Canada would appear to be inviting the rest of the WTO members to support the complaint, as it cites 188 US anti-dumping and countervailing duty determinations as examples, many of which involve other countries as parties to US trade disputes. This suggests that the complaint could fundamentally challenge the legitimacy of the US trade remedy system within the framework of the WTO.

The outcome of this WTO filing could have implications not only for the *North American Free Trade Agreement* (NAFTA) and Canada-US trade in general, but the international trade system as a whole, depending on how the US responds to Canada's challenge at the WTO. This is particularly because the current US administration has openly criticized the WTO and indirectly called for reform of the organization.

The other countries named in the annexes to this complaint can take part in the consultations, and this seems to be Canada's strategy in filing such a wide-ranging and unprecedented complaint.

The Trump Administration has applied high anti-dumping and countervailing duties on Canadian exports of softwood lumber and commercial aircraft. Given these disputes, the complaint appears to be directed against the US trade remedy system, and as such is a significant departure from past Canadian trade policy diplomacy and from effectively litigating specific cases under the NAFTA and WTO dispute resolution panels on these issues.

The context and timing of the complaint could potentially complicate not only currently outstanding US-Canada trade disputes, but also the next round of NAFTA renegotiations. They are scheduled to resume in Montreal on 23-28 January. Recent media reports suggest that the Canadian government is increasingly expecting that the United States could potentially withdraw from NAFTA¹ or at least issue the withdrawal six months' notice.

The publication of Canada's complaint has already prompted the US trade representative to state that the filing has lowered US confidence in Canada's commitment to beneficial mutual trade.²

Learn more

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¹ <https://www.reuters.com/article/us-trade-nafta-canada-exclusive/exclusive-canada-increasingly-convinced-trump-will-pull-out-of-nafta-idUSKBN1EZ2K4>

² <http://www.bbc.com/news/business-42639459>

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