United States

WTO issues ruling on 'US Definitive Anti-dumping and Countervailing Duties on Certain Products from China'

On March 11, 2011, the Appellate Body (AB) of the World Trade Organisation (WTO) issued a much-anticipated ruling in the case *United States—Definitive Anti-dumping and Countervailing Duties on Certain Products from China (DS379)*, which overturned a number of key findings made by a WTO panel in October 2010.

First, the AB looked at the question of whether the term "public body" in the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement) means "any entity controlled by a government." This issue is important because government hand-outs and other subsidies are only actionable under WTO rules if they are provided by a government or a "public body." The WTO panel that first heard the case held that inputs sold by Chinese state-owned enterprises (SOEs) to Chinese exporters and loans provided to these same entities by Chinese state-owned commercial banks (SOCBs) are potentially countervailable by an importing country because SOEs and SOCBs are "controlled by the government."

In reversing the panel on this narrow legal question, the AB drew a distinction between entities merely owned or controlled by a government and entities that exercise some degree of "governmental authority." According to the AB, "[a] public body within the meaning of Article 1.1.(a)(1) of the SCM Agreement must be an entity that possesses, exercises or is vested with governmental authority." When it came time to apply its ruling to the countervailing duties specifically imposed by the US Department of Commerce on various imports from China (i.e., certain steel pipe, laminated woven sacks, and certain tires), the AB found that there was insufficient evidence of governmental authority in the case of the SOEs it had examined. Whereas, in the case of the SOCBs at issue, the AB felt that there was sufficient "evidence on the record that these SOCBs exercise governmental functions on behalf of the Chinese Government."

The other significant issue addressed in the case was whether a government is permitted under WTO rules to impose anti-dumping (AD) and countervailing duties simultaneously with respect to the same product from the same country where that country, in this case China, is considered a "non-market economy." Before the panel, China argued that doing so would result in duplicate remedies (or "double counting") because the government agency making the determination of dumping will compare a surrogate for the exporter's home market sales (i.e., "normal value") that ignores any subsidies received to an "export price" in the United States that is net of any subsidies received. If the same subsidy is then subjected to a countervailing duty, China argued, it will be offset twice: once by the countervailing duty and once by the AD duty in an amount equal to the difference between normal value and the exporter's export price.

The WTO panel had found that neither the WTO Anti-dumping Agreement nor the SCM Agreement addressed the issue of double counting. According to the panel, because these provisions "do not *expressly* prohibit a [WTO] Member from offsetting the same domestic subsidies through the imposition of two different duties, it was the intention of the drafters to *authorise* such actions." Again, the AB reversed.

As the Appellate Body explained,

> . . . to the extent that such subsidy has contributed to a lowering of the export price . . . the subsidisation is "counted" within the overall dumping margin. When a countervailing duty is levied against the same imports, the same domestic subsidy is also "counted" in the calculation of the rate of subsidisation and, therefore, the resulting countervailing duty offsets the same subsidy a second time. (footnote omitted)

The AB went on to state:

> [i]t is counterintuitive to suggest that, while each agreement sets forth rules on the amounts of anti-dumping duties and countervailing duties that can be levied, there is no obstacle to the levying of a total amount of anti-dumping and countervailing duties which, if added together, would not be appropriate and would exceed the combined amounts of dumping and subsidisation found.

This AB ruling represents a major victory for China. US Trade Representative Ron Kirk said in a statement that this ". . .appears to be a clear case of overreaching by the Appellate Body." The Chinese mission to the WTO said it was "gratified by the WTO's recognition of what the Chinese government and Chinese producers have explained to the United States for the past five years. . ."

It is not clear how the United States will respond to this decision. The AB did not rule that the Commerce Department may not conduct concurrent AD and countervailing duty (CVD) investigations with respect to imports from China or other non-market economy countries. The AB simply ruled that Commerce cannot do so "without having assessed whether double remedies arose from such concurrent duties." Thus, it might be possible in future cases for Commerce to make this kind of assessment and remove any instance of double counting where it is found. In the meantime, there are numerous outstanding joint AD/CVD determinations that Commerce will have to address in some fashion. Under these circumstances, it is reasonable to ask whether China's graduation to market-economy status is in both countries' interest.

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