WTO Appellate Body Rules Against the EU's Individual Treatment Test for Exporters in Non-Market Economy Anti-Dumping Proceedings

The World Trade Organization (WTO) Appellate Body ("AB") Report in *DS397 EC-Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners From China*, published on 15 July 2011, following cross-appeals of the WTO Panel report issued in December 2009, should force the EU to change its anti-dumping rules and practice vis-à-vis non-market economy countries ("NMEs").

Article 9(5) of the EU Anti-Dumping Regulation Violates the WTO Anti-Dumping Agreement ("ADA")

Under Article 9(5) of the EU Anti-Dumping Regulation, exporters in NMEs can only obtain their own individual anti-dumping duty rate if they obtain individual treatment ("IT") by rebutting the presumption that their export sales are subject to State control. The AB ruled that Article 6.10 of the ADA requires an individual dumping margin determination for each exporter / producer, except in limited circumstances that are different from those covered by Article 9(5). It also decided that Article 15 of China's Protocol of Accession to the WTO allows WTO Members to treat China differently from other Members solely with respect to the calculation of "Normal Value" in anti-dumping proceedings, not as regards the determination of "Export Price."

The EU argued that under Article 9.2 of the ADA the imposition of individual anti-dumping duties is not required when this is "*impracticable*." The EU argued that this would be the case where there is a risk of circumvention by exporters with higher individual duties routing their products through exporters with lower duties. The AB disagreed, finding that the risk of circumvention spoke to the "ineffectiveness" of imposing individual anti-dumping duties, which does not by itself authorize the EU to impose country-wide duties on suppliers from NMEs that do not meet the EU's IT test.

The EU also attempted to argue that a single anti-dumping duty rate could be justified because exporters in NMEs that do not obtain IT form a "single entity" since they are all subject to the same State control. While the AB conceded that distinct exporters in an NME could form a single entity and would then be subject to a single anti-dumping duty rate, it decided that the IT test in Article 9(5) of the AD Regulation is not tailored to determine whether there is such State control. Thus, for exporters in NMEs that cooperate in an anti-dumping investigation, an individual dumping margin should be calculated separately from the margin determined for the non-cooperating exporters. Non-cooperating exporters, the AB said, could receive a country-wide residual duty that can be calculated on the basis of facts available.

The EU's Practice on the Composition of the Domestic Industry for Injury Purposes is Cast into Question under Article 4.1 of the ADA

The EU had defined the domestic fastener industry as only the 45 producers who were willing to be part of the sample selected by the EU and whose production represented 27% of total EU production. However, Article 4.1 of the ADA requires the injury assessment to be made based on a domestic industry representing a "*major proportion*" of the "*total domestic production*." While the WTO Panel decided that 27% of total domestic production could constitute a "*major proportion*" under Article 4.1, the AB disagreed with the Panel's reasoning. According to the AB:

(i) The EU's use of a benchmark of 25% to determine what is or is not a "*major proportion*" has no basis in the ADA. Though Article 5.4 of the ADA provides that no anti-dumping investigation can be initiated without the support of domestic producers representing at least 25% of total domestic production, that article concerns the standing requirement, which is separate from the injury assessment.

(ii) The EU made a selective assessment on the producers part of the domestic industry by restricting the domestic industry to the EU producers that supported the investigation. Thus, the EU introduced a risk of material distortion into the injury determination.

However, the AB deferred to the Panel's evaluation of the evidence in the fastener investigation, and thus did not reverse its conclusion that upheld the EU's selection of the domestic industry. Nonetheless, the AB's ruling on Article 4.1 may prompt the EU to be more vigilant in how it chooses to define the domestic industry in future investigations and to be more precise in how it explains this choice to interested parties.

The EU Violated Article 6.4 of the ADA by Failing to Provide Timely Information

The Chinese fastener exporters had provided information based on the product types identified in the Product Control Numbers ("PCNs") provided by the European Commission. The Indian producer whose data were used for the calculation of Normal Value did not provide such information and no where in the disclosure documents did the EU identify in detail how the model-matching between the Indian Normal Value and the Chinese Export Price had been made despite specific requests for such information by the Chinese exporters.

The AB ruled that the EU, by doing so, had violated Article 6.4 of the ADA that requires authorities to "*provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases. . .*". Moreover, under Article 2.4 of the ADA exporters can request adjustments for differences in the physical characteristics between the products used for the Normal Value and Export Price determination. Without details on the model-matching, such adjustments could not be requested, thus violating Article 2.4 of the ADA, as well as Article 6.2 which affords exporters the right to "*a full opportunity for the defence of their interests*".

It now remains to be seen how the EU will address the AB's conclusions and whether it will change its Anti-Dumping Regulation and practice. If the EU decides to comply with the AB's ruling, Article 9(5) of the Anti-Dumping Regulation will have to be amended along with the EU's practice. For the other issues, it is only the EU's practice that will have to be amended. In this regard, the ongoing WTO dispute settlement proceeding targeting the EU's imposition of anti-dumping measures on Chinese-origin footwear will be the next opportunity to test the EU's practice on transparency and the right of self-defense.

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