WTO Panel Issues Mixed Ruling in *US – GPX Legislation*

On March 27, 2014, a WTO panel issued a mixed ruling in a challenge brought by China against a recent US legislation related to the imposition of countervailing duties ("CVDs").[1] The law, enacted in March 2012 and commonly referred to as "the GPX Legislation," directly authorizes the use of CVDs against imports from non-market economy ("NME") countries. The panel in *US – GPX Legislation* rejected China's claims that the United States has acted inconsistently with its WTO obligations in enacting the GPX Legislation. However, the panel agreed with the complainant that the United States failed to investigate and avoid double remedies in 25 CVD proceedings against Chinese products and, therefore, has violated global trade rules administered by the WTO.

Background

The WTO dispute in *US – GPX Legislation* centers on the Unites States' treatment of China as an NME for the purposes of antidumping ("AD") and CVD proceedings. Both are common types of trade remedy proceedings, but the former is concerned with price discrimination favoring exports while the latter is concerned with illegal subsidies.

For more than 20 years, the US government refused to apply its CVD law to NMEs on private petitions. It reasoned that it could not disaggregate subsidies from other government policies in a centrally planned economy—i.e., an NME consists entirely of one entity inseparable from the government.[2] This was consistent with the NME methodology for dumping margin calculation, because it arguably has offset the effect of "subsidies" through use of a market economy surrogate.

However, since 2007 the executive branch of the US government has taken a new position that though China should remain an NME in general it was no longer a "Soviet-style" economy; therefore, it now can separately identify "subsidies" from other government policies and quantify their benefits to a Chinese exporter. Years of US domestic litigation ensued surrounding two complicated legal issues: (i) as the executive branch's authority to interpret AD and CVD laws depends on legislative authorization, whether it had exceeded its legal authority in adopting the new position rendering it unlawful and void; and (ii) even assuming the executive branch acted within the legal boundaries, whether and how the "double remedies" problem, created by the concurrent application of an AD rate with an implied subsidy offset and CVDs also targeting subsidization, should be addressed.

In December 2011, a three-judge panel of a federal appellate court found that the executive branch lacked the legislative authority to apply the US CVD statute to an NME because, as it existed at the time, the statute contained an imputed prohibition against such use. While the request for a reconsideration by the entire court (i.e., an *en banc* re-hearing) was pending, which stalled the legal effect of the three-judge panel ruling, President Obama signed the GPX

Legislation into law on March 13, 2012, amending the US CVD statute at issue in the on-going federal litigation. The new statute expressly authorizes the application of CVDs to imports from an NME and extends the applicable period of this authorization all the way back to November 20, 2006. In addition, the GPX Legislation also has a section aimed at addressing the issue of "double remedies," which on its face only applies to proceedings initiated after its enactment in 2012.[3]

China's WTO Challenge

On September 17, 2012, China requested consultations with the United States regarding the GPX Legislation (numbered Public Law 112-99), formally initiating the WTO dispute settlement process. China ultimately decided to focus its challenge on two timing-related features of the GPX Legislation: (i) Section 1 of Public Law 112-99 affirming the executive branch's authority "applies" to all CVD proceedings initiated on or after November 20, 2006; and (ii) Section 2 of the same law on "double-remedies" adjustment applies only to future proceedings, and thereby creates a vacuum period between November 20, 2006 and March 13, 2012, for which no statutory basis for adjustment was directly provided.

"RETROACTIVE" NATURE OF SECTION 1

In respect of Section 1, China raised claims under Articles X:1, X:2, and X:3(b) of the GATT 1994. Article X:1 requires laws of general application, made effective by any WTO member and pertaining to rates of duty, taxes or other charges, be promptly published in a proper manner. The panel in *US – GPX Legislation* (the "Panel") found that Section 1 falls within the scope of Article X:1, however, it disagreed with China that Section 1 was "made effective" back in 2006. Instead, the Panel determined that Section 1 was "made effective" on March 13, 2012, i.e., when Public Law 112-99, as a whole, formally entered into force.[4] The Panel thus concluded that Section 1 was published "promptly" because it was made effective and published on the same date.[5] Accordingly, the United States did not act inconsistently with Article X:1 of the GATT 1994.

Article X:2 states that no measure of general application taken by any WTO member "effecting an advance in a rate of duty or other charge on imports under an established and uniform practice, or imposing a new or more burdensome requirement, restriction or prohibition on imports shall be *enforced* before such measure has been officially published." (emphasis added). All three panelists agreed that Section 1 is a measure of general application and it had been "enforced" prior to its official publication.

The majority of the Panel went on to find that Section 1 nonetheless falls outside the scope of Article X:2, because it neither effects an "advance" in a rate of duty or other charge on imports under an established or uniform practice, nor imposes a "new" or "more burdensome" requirement or restriction on imports. In particular, the Panel majority based its finding, in part, on the fact that Section 1 did not result in any change to the CVD rates that were already applied by the United States,[6] and that the US judiciary had not ordered the executive branch to "discontinue" or "change" the relevant CVD practice when Section 1 was enacted (due to the appeal process).[7] The Panel majority therefore concluded that the United States did not act inconsistently with Article X:2 of the GATT 1994. One panelist dissented from this part of the Panel majority finding and therefore reached the opposite conclusion, finding the United States in non-compliance with Article X:2.

China's third claim relied on the requirement in Article X:3 that tribunals "be independent of the agencies entrusted with administrative enforcement and their decisions shall be implemented by, and shall govern the practice of, such agencies unless an appeal is lodged." Significantly, the Panel rejected China's

argument that if a legislation such as Section 1 was permissible, there would be "no point" to seeking judicial review of what an interested party considers to be unlawful agency conduct, because an independent tribunal's favorable finding could always be superseded by the enactment of a new law that renders the agency's actions lawful after the fact.[8] The Panel ruled that Article X:3(b) does not prohibit a WTO member from taking legislative actions in the nature of Section 1, *to wit,* supersede a judicial determination that is pending when the legislation comes into force.[9] Therefore, the United States did not act inconsistently with Article X:3(b) of the GATT 1994.

FAILURE TO INVESTIGATE "DOUBLE REMEDIES"

Issues surrounding the application of "double remedies" are equally contentious. They have been heavily litigated both in the United States and before the WTO. Under US laws, when imports from an NME are involved the dumping margin generally is calculated by comparing a "normal value" constructed based on a most similar market economy (i.e., the "surrogate country"), with the actual export prices charged by the producer subject to investigation. This is an "asymmetric" comparison because the constructed "normal value" in theory does not reflect any subsidy received by the producer as it is based on a third-country surrogate, whereas when subsidies have been received by the producer, the product's actual export price is presumably lower than it would have been in absence of subsidization. As a result, the NME methodology already offsets subsidies received by a foreign producer, to the extent that the subsidy has contributed to a lowering of the export price. The "double remedies" problem arises when the same subsidy is also specially investigated and the resulting CVD offsets it a second time.

In *US – AD and CVDs (China)*, the Appellate Body ruled that applying "double remedies" through the concurrent imposition of AD duties based on the NME methodology and CVDs, was prohibited under the WTO Agreement on Subsidies and Countervailing Measures (the "SCM Agreement").[10] It found the application of "double remedies" inconsistent with the requirement in Article 19.3 of the SCM Agreement that countervailing duties be levied in the appropriate amounts in each case. In *US – GPX Legislation*, Section 2 of Public Law 112-99 was written as inapplicable to past proceedings and, in the absence of a statutory mandate, there was no sign from the executive branch that any relief would be granted retroactively. Rather than grapple with the text of Section 2, the Panel seized on the fact that the executive branch did not investigate the potential application of "double remedies" in 25 past proceedings named by China (a fact that the GPX Legislation did nothing to change). Relying heavily on precedent, the Panel concluded that the United States therefore has acted inconsistently with various articles of the SCM Agreement.[11]

Implications and US Section 129 Proceedings

The United States refrained from taking a position on whether the GPX Legislation is of "retroactive application," throughout the panel process. Nevertheless, all the WTO claims regarding Section 1 amount to a legal challenge to its application to past proceedings. In essence, the United States, in the form of a new law, legitimized conduct and events that had occurred in the past. This renders moot the legal dispute over whether the past occurrences were unlawful under the old law, because their legitimacy may be derived from the new law in any event. Problematic as it may sound, the Panel sided with the United States and ratified the law's retroactive application along with the legitimacy of all past CVD proceedings relying on the authority it granted after the fact. However, more importantly, there has been no serious prediction that the new authority with respect to future proceedings would be voided

either by a domestic court or a WTO tribunal. In other words, the United States' new practice applying CVDs to imports from an NME is here to stay.

By way of contrast, the "double remedies" issue is of a more enduring nature. Irrespective of the pre-GPX Legislation era, it is hardly disputed that CVDs may be levied lawfully against imports from an NME after the law entered into force. With respect to the law's prospective application, the question is "how," to which "double remedies" directly relates. Section 2 of the GPX Legislation was drafted in broad strokes, and it does not apply to proceedings initiated before the law's enactment. Nevertheless, the relevant practice is developing within the US system.

As a result of *US – AD and CVDs (China)*, the United States had to initiate several Section 129 proceedings, which resulted in a reduction of the combined duties in four trade remedy cases targeting Chinese imports. If the Panel ruling is maintained, it likely again will have to reopen the 25 investigations and reviews by way of Section 129 proceedings, in order to determine whether double remedies were applied. In the Section 129 determinations to date, the executive branch followed a practice of reducing the total CVD rate by 63.07 percent of what may be called "input subsidies" (e.g., government provision of raw materials without charge), to the exclusion of other common types of government assistance (e.g., subsidized bank loans).[12] This sheds some light on how Section 2 may be implemented in future trade remedy cases against NME imports.

The United States and China each have incentive to file an appeal to the Appellate Body. Although it is hard to predict the result regarding Section 1's "retroactive application," the United States no doubt would face an uphill battle on the double remedies front. In any event, as the legal fight over "past authority" drawing to a close, more attention and scrutiny may shift to the issue of whether the US government's looming practice on double remedies adjustment can withstand a challenge under US laws and globe trade rules.

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Endnotes

[1] Panel Report, *US–Countervailing Duty and Antidumping Measures (China)*, WT/DS449/R (Mar. 27, 2014) ("US–GPX Legislation").

[2] See, e.g., *Georgetown Steel Corp. v. United States*, 801 F.2d 1308, 1314-18 (Fed. Cir. 1986) ("Even if one were to label these incentives as a 'subsidy,' in the loosest sense of the term, the government of those [NMEs] would in effect be subsidizing themselves.").

[3] For more background on the US litigations and enactment of GPX Legislation, see our Legal Updates, *US Court of International Trade Orders US Government to Cancel Countervailing Duties on Chinese Off-the-Road Tires*; *Federal Circuit Exempts Non-Market Economy Country Exports from US Countervailing Duty Law*; *President Obama Signs Legislation Applying Anti-Subsidy Trade Law to Imports from Non-Market Economies Such As Vietnam and China*.

[4] Panel Report, *US–GPX Legislation*, para. 7.88.

[5] *Id.*

[6] *Id.* Para. 7.189.

[7] *Id.* Para. 7.184 & 190

[8] *Id.* Para. 7.283.

[9] *Id.* para. 7.291–7.292.

[10] Appellate Body Report, *US–Anti-Dumping and Countervailing Duties (China)*, WT/DS379/AB/R (Mar. 11, 2011).

[11] Panel Report, *US–GPX Legislation*, para. 8.1.c.

[12] US Department of Commerce, *Section 129 Determination of the Countervailing Duty Investigation of Circular Welded Carbon Quality Steel Pipe from the People's Republic of China*: "Double Remedies" Analysis Pursuant to the WTO Appellate Body's Findings in WTO DS 379 (May 31, 2012), *available at* https://docs.google.com/file/d/0B3psE802f8WOZzQxSWE4Nno3bnM/edit?usp=drive_web&pli=1, *unchanged by* Final Determination: Section 129 Proceeding Pursuant to the WTO Appellate Body's Findings in WTO DS379 Regarding the Antidumping and Countervailing Duty Investigations of Circular Welded Carbon Quality Steel Pipe from the People's Republic of China (July 31, 2012), *available at* http://enforcement.trade.gov/download/section129/prc-cwcq-steel-pipe-Final-129-Determination-20120830.pdf.