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Trade Remedies and Non-Market Economies: The WTO Appellate Body's Report in *United States—Definitive Antidumping and Countervailing Duties on Certain Products from China*

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Introduction

On March 11, 2011, the Appellate Body (AB) of the World Trade Organization (WTO) issued its report in the WTO dispute brought by China against the United States concerning four sets of antidumping and countervailing duty determinations by the United States Department of Commerce (USDOC).[1]

On March 25, 2011, the WTO Dispute Settlement Body adopted the Appellate Body report, as well as the findings of the panel below that were not reversed.

This dispute resolved a range of important questions on how and when WTO member governments can impose countervailing duties (extra duties on imports to offset subsidies conferred by foreign governments) on products from non-market economies (NMEs) such as China. Among others, the AB ruled on:

- the scope of “public bodies” whose provision of goods or services can legally constitute subsidies under the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement), and how this rule applies in the context of China’s state-owned-enterprises (SOEs) and state-owned commercial banks (SOCBs);
- when SOCB lending subsidies are “specific” enough to be countervailable;
- how the amounts of subsidies are to be calculated in light of alleged distortion of in-country prices and lending rates within China; and
- the conditions under which it is permissible to apply countervailing duties concurrently with antidumping duties calculated using a special methodology for goods from NMEs.

On July 5, 2011, the parties to the case notified the WTO that the United States had agreed to implement the rulings and recommendations in the case by February 25, 2012.[2] These rulings, if fully implemented, will have a major impact on how the United States and other WTO members conduct trade remedies proceedings, particularly countervailing duty proceedings, against imports from NMEs.

Background

China brought this WTO dispute in September 2008 following the USDOC’s decision in

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2007 to apply U.S. countervailing duty law to imports from China. Prior to 2007, the USDOC had taken the position that the distortion of all prices and interest rates in NMEs precludes the application of countervailing duties against NME-origin imports.[3] Instead, the USDOC applied antidumping duties in NME cases using a special methodology that calculates the normal value of the imports based on market-determined costs and prices from a surrogate country. Since its 2007 change of position, the USDOC has been willing to impose *both* countervailing duties and NME antidumping duties on imports from NMEs. This case concerned the four sets of USDOC determinations issued in 2008 that led to the first four such concurrent duties.[4]

This was a high-stakes case for China and for import-competing industries in the United States that are petitioners in trade remedies cases. China's WTO accession protocol allows the use of a special NME methodology that is not based on a strict comparison with domestic prices or costs in China in antidumping cases for the first fifteen years of China's WTO membership.[5] which runs through 2016. China's accession protocol also allows special flexibility in calculating subsidies on imports from China, and this flexibility is permanent.[6] After 2016, countervailing duties may become the main avenue for trade remedies against Chinese goods in the United States and elsewhere. Therefore, the question of when and how countervailing duties can be imposed on Chinese goods under the WTO rules is of crucial importance to the world trade community.

The subsidy programs involved in the four sets of cases at issue in this dispute were primarily input subsidies by SOE input suppliers, loan subsidies by SOCBs, and government land use rights subsidies. The USDOC determined that the legal requirements for a countervailable subsidy—financial contribution, specificity, and benefit[7]—were met for each of the major programs. The USDOC determined that China's SOE input suppliers and SOCBs (including the four largest Chinese banks) constituted "public bodies" and therefore provided financial contributions within the meaning of Article 1.1 of the SCM Agreement.[8] The USDOC also determined that the provision of preferential loans by SOCBs was *de jure* specific and that the government provision of land use rights was regionally specific.[9] Finally, the USDOC rejected China's in-country input prices, interest rates, and prices for land use rights as being distorted by the government, and selected or constructed out-of-country benchmarks to determine the existence and amounts of the benefits of the subsidies.[10]

The USDOC also denied requests by the Chinese respondents and the Chinese government that it take steps to avoid double-counting of subsidies, or "double remedies." The USDOC's NME methodology calculates the normal value of the subject imports on the basis of non-subsidized prices from a surrogate country.[11] The Chinese parties argued that while domestic subsidies cannot lower normal value under the USDOC's NME methodology, they lower export prices *pro rata*, thereby inflating antidumping duties by the amount of domestic subsidies that have already been remedied by countervailing duties.[12] The USDOC denied the Chinese parties' requests after determining that it lacks statutory authority to address double remedies and after rejecting the Chinese parties' argument that domestic subsidies are presumed to automatically lower export prices *pro rata* under U.S. antidumping law.[13] In a separate appeal filed by a Chinese respondent in one of the four sets of investigations at issue in this WTO dispute, the U.S. Court of International Trade ruled that double remedies violate U.S. law and ordered the USDOC to forego the application of countervailing duty law to imports from NMEs.[14] How the double remedies issue would come out under WTO law was a central question in this WTO dispute.

The Panel Report

The panel report in this dispute, circulated on October 22, 2010, found in favor of the United States on most issues. The panel interpreted the term "public body" under Article 1.1 of the SCM Agreement to mean "any entity controlled by a government." [15] It upheld the

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USDOC's determinations that the SOE input suppliers and SOCBs in question were public bodies.[16] This conclusion, reached purely on the basis of the SCM Agreement, was not China-specific and could have a broad impact on many developing countries with a major SOE presence in their economies.

The panel further held that the USDOC was justified in finding that the SOCB lending in question was *de jure* specific, as it could have reasonably determined that Chinese government economic plans direct the SOCBs to provide financing to specific projects in certain industries.[17] The Panel did find, however, that the USDOC's regional specificity determination as to land use rights was inconsistent with the SCM Agreement because the USDOC based that determination only on the fact that the land was physically located in a designated area, and it failed to assess whether the provision of land use rights in the designated area constituted a "distinct regime" compared with land use rights outside of the area.[18]

The panel further held that the USDOC was justified in disregarding China's in-country prices as benchmarks for the alleged input, loan, and land use rights subsidies because USDOC could have reasonably concluded, based on the record evidence, that China's in-country prices were distorted due to the predominant role of the government and SOEs in those markets.[19]

On the double remedies issue, the panel understood the dispute between China and the United States to concern the extent of double remedies in specific factual circumstances.[20] It held, however, that it did not need to address this issue because, in its view, double remedies, even if they do arise, were not inconsistent with (or not regulated by) the various provisions of the SCM Agreement and the General Agreements on Tariffs and Trade 1994 cited by China.[21]

The Appellate Body Report

The instant AB report addressed the panel's rulings on public body, specificity, benefit benchmarks, and double remedies. On double remedies, the AB rejected the panel's reading of the SCM Agreement as allowing trade remedies investigating authorities to "find entities with any connection to government to be public bodies." [22] It read "public body" under Article 1.1 of the SCM Agreement to mean "an entity that possesses, exercises or is vested with governmental authority," [23] and held that "evidence of government ownership, in itself, is not evidence of meaningful control of an entity by government and cannot, without more, serve as a basis for establishing that the entity is vested with authority to perform a governmental function." [24] The AB rejected the USDOC's public body determination for the SOE input suppliers because the USDOC relied on the government's majority ownership of the suppliers without seeking other information relevant to government control. [25] The AB did find, however, that the USDOC's public body determination with respect to SOCBs was supported by record evidence indicating that SOCBs in China are controlled by the government and carry out policy lending under state plans. [26]

On specificity, the AB upheld the panel's finding as to the *de jure* specificity of the SOCB lending in question. The AB understood China not to be appealing the USDOC's specificity determination as such. [27] Rather, according to the AB, China was only challenging those elements of the panel's analysis that superimposed additional considerations upon the USDOC's approach. [28] The AB held that despite some elements of the reasoning of the panel that did not parallel the rationale employed by the USDOC, the panel ultimately conducted a proper factual analysis based on the totality of evidence on which the USDOC based its *de jure* specificity determination. [29]

On benefit benchmarks, the AB agreed with the panel that based on the record evidence,

the USDOC was justified in rejecting China's in-country input prices and interest rates as subsidy benchmarks.[30] Particularly, the AB held that the USDOC did not arrive at its decision to reject China's in-country input prices as subsidy benchmarks through the application of a *per se* rule based on the role of the government as the predominant supplier of the inputs, as China argued.[31] The AB found that the USDOC's considerations of factors other than government market share was "somewhat cursory"[32] but nevertheless sufficient because, according to the AB, when the government is the predominant supplier, factors other than government market share carry less weight in determining price distortion.[33]

On double remedies, the AB reversed the panel's holding and held that the amount of a countervailing duty cannot be "appropriate" under Article 19.3 of the SCM Agreement where double remedies will likely arise.[34] However, the AB also rejected China's argument that double remedies *necessarily* result every time that a government concurrently applies NME antidumping duties and countervailing duties.[35] To the AB, the existence of double remedies is a factual question whose answer depends on whether and to what extent domestic subsidies have lowered export prices, and whether the investigating authority has taken steps to take account of double remedies.[36] The AB found that investigating authorities have the affirmative obligation to make inquiries into this factual question.[37] The AB ruled that the USDOC acted inconsistently with Article 19.3 of the SCM Agreement in the four investigations at issue by failing to conduct an examination of whether double remedies would arise.[38]

Analysis and Implications

If fully implemented, the AB report will have a far-reaching impact on the way trade remedies proceedings, particularly countervailing duty proceedings, are conducted for imports from NMEs. Most significantly, the AB's holding on double remedies permits concurrent imposition of NME antidumping duties and countervailing duties only if the investigating authority affirmatively demonstrates that double remedies would *not* arise in a specific proceeding (i.e., the subsidies in question would *not* lower export prices *pro rata*), or takes affirmative steps to avoid double remedies. The USDOC could alternatively choose to impose only antidumping duties or only countervailing duties on imports from NMEs, or impose concurrent antidumping and countervailing duties but stop using NME methodology to calculate antidumping duties. Any of the above scenarios would be a significant departure from the USDOC's current practice.

The AB report will also have a major impact on the identification and calculation of countervailable subsidies for imports from China. The USDOC will not be able to treat China's SOEs as "public bodies" within the meaning of Article 1.1 of the SCM Agreement merely because they are majority government-owned. For input subsidies allegedly provided by China's SOEs, unless petitioners can show that the SOEs are controlled by the government and exercises governmental functions, they will have to demonstrate that the SOEs are "entrusted or directed" by the government to provide financial contributions, as provided under SCM Article 1.1(a)(1)(iv). As for SOCBs, however, the USDOC has essentially been given a green light to treat them as public bodies, at least for now. That, coupled with the upholding of the USDOC's *de jure* specificity determination and the use of out-of-country benchmarks for SOCB lending, will make it easier to find SOCB lending a countervailable subsidy. The USDOC will presumably have greater difficulties countervailing land use rights subsidies, as it will have to demonstrate the existence of a "distinct regime" in order to find regional specificity for land use rights. However, the USDOC will enjoy wide latitude to disregard China's in-country prices and interest rates as benchmarks in measuring input, loan, and land use rights subsidies, upon a showing that China's in-country prices and interest rates are distorted by the government.

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Endnotes:

[1] Appellate Body Report, *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R (Mar. 11, 2011), available at <http://www.worldtradelaw.net/reports/wtoab/us-adcvdchina%28ab%29.pdf> [hereinafter *AB Report*].

[2] United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, Agreement under Article 21.3(b) of the DSU, WT/DS379/11 (July 8, 2011).

[3] This position was endorsed by the U.S. Court of Appeals for the Federal Circuit in its 1986 decision in *Georgetown Steel v. United States*, 801 F.2d 1308 (Fed. Cir. 1986).

[4] The four sets of antidumping and countervailing duty determinations covered four products from China: circular welded carbon quality steel pipe; light-walled rectangular pipe and tube; laminated woven sacks; and certain new pneumatic off-the-road tires. See *AB Report*, ¶¶ 1.

[5] Protocol on the Accession of the People's Republic of China, WT/L/432, art. 15(a)(ii), 15(d).

[6] *Id.* art. 15(b).

[7] See WTO Agreement on Subsidies and Countervailing Measures art. 1, available at http://www.wto.org/english/docs_e/legal_e/24-scm_01_e.htm#Article1.

[8] Panel Report, *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, ¶¶ 8.97-98, WT/DS379/R (Oct. 22, 2010), available at <http://www.worldtradelaw.net/reports/wtopanels/us-adcvdchina%28panel%29.pdf> [hereinafter *Panel Report*].

[9] *Id.* ¶¶ 2.5 (*de jure* specificity), 2.13 (regional specificity).

[10] *Id.* ¶¶ 2.4, 2.5, 2.9, 2.13, 2.17.

[11] For details of the USDOC's NME methodology, see USDOC, Antidumping Manual, Ch. 10, 11-31, <http://ia.ita.doc.gov/admanual/2009/Chapter%2010%20NME.pdf>.

[12] The Chinese parties' arguments on double remedies before the USDOC are summarized in *Issues and Decision Memorandum for the Final Determination in the Less-Than-Fair-Value Investigation of Coated Free Sheet Paper from the People's Republic of China*, 10-12 (Oct. 17, 2007).

[13] *Id.* at 13-16.

[14] See *GPX Int'l Tire Corp. v. United States*, 645 F. Supp. 2d 1231 (Ct. Int'l Trade 2009); *GPX Int'l Tire Corp. v. United States*, No. 08-00285, Slip. Op. 10-84 (Ct. Int'l Trade Aug. 4, 2010), available at http://www.cit.uscourts.gov/slip_op/Slip_op10/10-84.pdf. That case is currently on appeal before the U.S. Court of Appeals for the Federal Circuit.

[15] *Panel Report*, *supra* note 8, ¶ 8.94.

[16] *Id.* ¶¶ 8.138 (SOE input suppliers), 8.143 (SOCBs).

[17] *Id.* ¶ 9.106.

[18] *Id.* ¶ 9.159.

[19] *Id.* ¶¶ 10.61, 10.66 (inputs), 10.82 (land use rights), 10.148 (loans).

[20] *Id.* ¶ 14.75.

[21] See *id.* ¶¶ 14.120 (art. 19.4 of the SCM Agreement), 14.130 (art. 19.3 of the SCM Agreement), 14.136 (art. VI:3 of the GATT 1994), 14.138 (art. 10 of the SCM Agreement), 14.139 (art. 32.1 of the SCM Agreement), 14.147 (art. 12.1 of the SCM Agreement), 14.148 (art. 12.8 of the SCM Agreement), 14.182 (art. I:1 of the GATT 1994).

[22] *AB Report*, *supra* note 1, ¶ 303.

[23] *Id.* ¶ 317.

[24] *Id.* ¶ 346.

[25] *Id.*

[26] *Id.* ¶ 355.

[27] *Id.* ¶ 397.

[28] *Id.*

[29] *Id.* ¶ 400.

[30] *Id.* ¶¶ 458 (input prices), 509 (interest rates).

[31] *Id.* ¶ 457.

[32] *Id.* ¶ 454.

[33] *Id.* ¶ 455.

[34] *Id.* ¶ 582.

[35] *Id.* ¶ 599.

[36] *Id.*

[37] *Id.* ¶ 602.

[38] *Id.* ¶¶ 604-05.