ABA Section of International Law
INTERNATIONAL TRADE COMMITTEE NEWSLETTER
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WELCOME

Welcome to the ABA International Trade Committee quarterly newsletter. The newsletter is intended to assist Committee members stay up-to-date on current international trade issues and Committee activities. The newsletter also provides a forum to discuss international trade ideas and opinions.* In this issue are three different and interesting articles related to topics of interest in international trade law.

This issue also contains information on working groups and recent and upcoming events, beginning on page two. Members of the Committee are encouraged to become involved, and we look forward to hearing from you.

The Committee's website contains additional information about and resources from the activities of the Committee, like notices of upcoming events, past publications, and materials from previous programs. These materials are updated regularly. To visit the Trade Committee's website, click here.

* Please note that the views and opinions expressed in the newsletter are those of the authors and may not represent the views and opinions of the ABA or the Trade Committee.

ARTICLES IN THIS ISSUE:

International Trade Law." Panelists discussed a variety of pressing issues, to include recent WTO disputes and impacts on other industries; the purpose and impact of pending U.S. trade legislation and whether it is likely be passed in 2011; recent trade remedy decisions within the agencies and at the Court of International Trade; and current international trade policy issues, such as pending Free Trade Agreements and the Obama Administration's current efforts to enforce trade laws. The speakers were Stacy Ettinger, The Office of U.S. Senator Charles Schumer, Washington, D.C.; Bruce Wilson, King & Spalding LLP, Washington, D.C.; and Commissioner Dean Pinkert of the ITC. The Committee's Co-Chair Amy Stanley Hariani moderated the program.

On April 12, 2011, the Committee sponsored a program in cooperation with American University, Washington College of Law entitled "Are AD/CVD Remedies Still Viable for U.S. Producers?" A panel discussed whether the recent dearth of AD/CVD filings signifies that Title VII of the Tariff Act of 1930 has outlived its usefulness. The speakers included Bradford Ward, Deputy General Counsel & Acting Assistant U.S. Trade Representative for Monitoring and Enforcement; John Magnus of TRADEWINS; Peter Ehrenhaft of Harkins Cunningham; and Daniel Porter of Winston & Strawn. The program was followed by a dinner honoring Mr. Ward.

On May 3, 2011, the Committee hosted a program on the Trans-Pacific Partnership Negotiations at the U.S. Chamber of Commerce. The Trans-Pacific Partnership includes the usual topics involved in a FTA, plus novel issues such as "regulatory coherence", "competitive neutrality", "supply chain", and other sensitive 21st Century trade topics. An expert panel discussed the status and goals of the negotiations, and the complex challenges ahead. Speakers were Catherine Mellor, Associate Director, Southeast Asia International Division, U.S. Chamber of Commerce; Ben King, Counsellor - Trade and Economic, Embassy of New Zealand; and Everett Eissenstat, International Trade Counsel (Minority), U.S. Senate Committee on Finance. Gary Horlick, of the Law Offices of Gary N. Horlick, moderated event.

Several additional programs are in the works for the coming months. Check your email and the Committee website for upcoming details on all these programs.

DOUBLE-REMEDIES AND DS 379

By: John R. Magnus[*]

Introduction

The WTO Appellate Body ("AB") recently issued a decision finding the United States' concurrent imposition of antidumping and countervailing duties on various Chinese products to be inconsistent with WTO rules.[1] The decision reversed a lower panel ruling which had rejected China's complaint as having no support in the text of the relevant WTO agreements. At issue was China's claim that the U.S. import relief measures provided a "double remedy" by offsetting domestic subsidies twice – once through the antidumping duty and a second time through the countervailing duty. Although separate (cumulative) offsets for dumping and for domestic subsidization are normally regarded as non-controversial, China maintained that an antidumping duty calculated under the "surrogate" methodology applied by the United States to non-market economy ("NME") products necessarily already reflects, and offsets, domestic subsidies. The AB largely agreed and rested its ruling against the United States on language in ASCM Article 19.3 which refers to imposing the "appropriate" per-unit amount of countervailing duty.

A Bizarre Decision

The following is a fair summary of the AB decision.

> *Domestic subsidies when used to reduce export price will, unless they also produce a lower normal value calculation, increase the recipient's dumping margin and be offset by higher antidumping duties. It would be improper to separately offset such domestic subsidies through countervailing duties imposed on top of the (higher) antidumping duties. In NME cases, where domestic subsidies cannot affect normal value, it is therefore essential to know whether domestic subsidies have been used to reduce export price. Accordingly, when conducting simultaneous AD/NME and CVD investigations, administering*

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[1] *United States – Definitive antidumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R (Mar. 11, 2011).

authorities are obliged to do two things they are not normally accustomed to doing:

- *Ascertain not only whether/to what extent dumping occurred during the POI, but also* ***why*** *it occurred (what role domestic subsidies played in the pricing of exports); and*

- *Ascertain* ***how domestic subsidies were used****, at least to the extent of understanding whether the recipient company reduced its export prices in a way that would not have happened in the absence of domestic subsidization.*

Every step of this finding is problematic.

First, there is no logical reason why the principle announced by the AB would be limited to the NME setting. Insofar as it even makes sense to speak of "using domestic subsidies to reduce export price," a ME producer is every bit as likely to engage in the tactic. And the regular (ME) antidumping methodology does not yield a normal value that is lower in the presence of domestic subsidies – certainly not in a systematic or dollar-for-dollar sense.[2] So, if it is improper in the simultaneous AD/CVD scenario to offset through countervailing duties domestic subsidies which have been used to reduce export price, it is *always* improper. And if it is therefore necessary to understand the role of domestic subsidies in generating dumping margins, it is *always* necessary.

Second, there is a reason why administering authorities do not ask, and why the multilateral rules have never required them to ask, how domestic subsidies were used or why dumping occurred. These things are – at least for practical purposes, and within the tight timelines imposed on AD/CVD proceedings – unknowable. If a single person (say a grocery store clerk) got a raise, an extra $50 per paycheck over the course of a full year, would it be possible to say later how she used the extra money? Most likely every category of her spending (and saving if she is a saver) would have increased in some small proportion. It is no different when a producer receives domestic subsidies. Is there new machinery? It might have been purchased anyway. Did export prices change? A million other things (one obvious candidate being market conditions in the importing country) might have prompted that. The problems of investigation, and of proof, when it comes to connecting subsidies to later corporate behavior, would be insurmountable in any sort of investigation, let alone the time-constrained setting of an AD/CVD investigation.

Third, it is clear for other reasons that the WTO Members, by using the word "appropriate" in ASCM Article 19.3, were not committing to have their administering authorities do something that is impossible. The AB's reading is not even plausible, much less the only permissible one. In fact, there is a specific rule on this point which has been in place at the multilateral level (in GATT Art. VI:5) since 1947. It holds that export-contingent subsidies may not be separately offset through countervailing duties imposed atop antidumping duties. The AB has now effectively rewritten this rule to apply also to domestic subsidies that are used (as export-contingent subsidies are presumed to be used) to reduce export price. By interpreting the term "appropriate" in ASCM Article 19.3 in this fashion, the AB has reduced to inutility ("surplusage") the long-standing provision in GATT Art. VI.

A Broader Policy Argument

Those who argue against a CVD offset in the scenario discussed above also oppose a CVD offset in the other scenario – where domestic subsidies are not used to reduce export price. Here, a hypothetical is useful in understanding the legal and policy issues. Imagine two neighboring NME producers using identical recipes to make subject merchandise, selling that merchandise at identical prices in the U.S. market, benefiting from identical domestic subsidies, and generating identical total turnover. With identical recipes and export prices they will have the same normal value and dumping margin, and with identical domestic subsidies and turnover they will face the same CVD rate. Now imagine that one of the producers gets an extra subsidy – say a $10M cash grant – and does *not* use it to reduce the price of its U.S.-bound exports.

There will be no impact on the favored producer's dumping margin. The normal value side of the NME dumping calculation has no means of reflecting the extra subsidy; with the same recipe as its neighbor, the extra-subsidized producer will continue to have the same normal value, and we have assumed that

[2] The AB apparently disagrees (*see* fn. 519, citing Panel Report at fn. 972), but does not explain why; it simply asserts: "in the context of domestic subsidies granted within market economies …, both the normal value and the export price will be lowered as a result of the domestic subsidy …." The assumptions underlying this statement are not just debatable; they are almost certainly wrong. That the Panel had indulged the same wrong assumptions is no excuse for the AB doing so in such a momentous decision.

export price stays constant. So the extra subsidy will be offset, if at all, only through a higher countervailing duty. Should it be offset?

Here, the double-remedy argument emerges as a new installment of the age-old debate about the proper function of countervailing duties. Some will argue that a subsidy stipulated to have no effect on export prices is one we should ignore (i.e., should not offset). Others will insist that the function of countervailing duties is not to offset the price (or output) effects of subsidies, but rather to counter the subsidies themselves.

As a policy debate, it is interesting. As a legal debate, … not so much. There is not a smidgeon of doubt that U.S. law requires (where the injury test is met) a full offset of subsidies without consideration of their price/output effects. And there is not a smidgeon of doubt that WTO rules permit the approach reflected in U.S. law.

Difficult to Implement

The Appellate Body decision in DS 379 elevated policy preference over legal judgment, and in that respect should be lamented by everyone but most especially by the WTO's supporters. The appropriate U.S. response would be to announce that it (1) has no intention of seeking to implement the decision, (2) will refuse to join in a consensus to reappoint (for second terms) the three AB members who signed the decision, and (3) will not approve a Doha Round package unless the AD/ASCM reforms in that package comprehensively remove all uses of the term "appropriate" as well as similar terms such as "fair" (as in "fair comparison") and any other formulation that could be used by the WTO judiciary to impose its own policy preferences.

But that short list presupposes a spine of the type not normally known to exist in Washington, DC. What if, instead, the Commerce Department seeks to travel the road the AB wants it to travel? The road will be bumpy because Commerce can never really know what the AB wants it to know:

- How did the producer deploy domestic subsidies within the mix of all other corporate resources and expenditures? Often the producer's CFO could not even answer that question – and even if she could, and if she testified under oath at an agency hearing, there would be huge problems of credibility and documentary corroboration. And then there is the small problem that U.S. law (Section 771(5)(C)) specifically steers Commerce *away* from considering price/output effects when analyzing subsidies.

- What role did domestic subsidies play among the many possible causes of the normal value / export price differential? To even begin tackling that question, Commerce would have to collect and analyze reams of U.S. market data of the type normally reviewed only by the USITC – and obtained through the use of subpoena power which Commerce does not enjoy.

Respondents will insist they did use domestic subsidies to reduce their export price, so that the dumping margin fully reflects the subsidization. Petitioners will insist that no such cause-and-effect relationship exists. Commerce will have no way of learning where the truth lies, and no ability to make a finding that satisfies the substantial evidence standard. Everything will come down to where the burden of proof resides. Apparently, and despite the fact that respondent producers are the only ones who conceivably could have access to the relevant information, the AB will not countenance any assignment of a burden to them.[3]

So implementation would be, to say the least, problematic. One temptation will be to run the clock (that is, find ways to buy time, perhaps through partial compliance steps that leave the full AD and CVD offsets in place), on the assumption that once China graduates to ME status in 2016, the DS 379 decision will no longer pose a problem to concurrent AD/CVD proceedings. That assumption is not a sound one, however, as the issues presented here are in no way confined to the NME setting. Only the normal value analysis differs for NMEs, and the surrogate data used in NME cases do not yield normal values that differ for subsidized vs. unsubsidized producers. If Commerce

[3] *See* AB Report at para 602: "In the same way, … as an investigating authority is subject to an affirmative obligation to ascertain the precise amount of the subsidy, so too is it subject to an affirmative obligation to establish the appropriate amount of the duty under Article 19.3. This obligation encompasses a requirement to conduct a sufficiently diligent 'investigation' into, and solicitation of, relevant facts, and to base its determination on positive evidence in the record. We recall our finding above that, among the factors to be taken into account by an investigating authority, in establishing the 'appropriate' amount of countervailing duty to be imposed, is evidence of whether and to what degree the same subsidies are being offset twice when anti-dumping and countervailing duties are simultaneously imposed on the same imported products."

was wrong to ignore the possibility that the domestic subsidies in the China cases were used (wholly or partly) to reduce export prices, then it is always wrong to do so regardless of how normal value is established.

What to Do?

The DS 379 decision is not wrong because it is impractical. It is wrong because it lacks textual support and creates new obligations. The AB essentially started from an economic theory (about the "likely" effects of domestic subsidization), articulated a policy preference based on that theory, and then interpreted the word "appropriate" in ASCM Article 19.3 as a license to impose that policy preference on the defending Member. The economic theory is a simplistic and inaccurate one, however, and the policy preferences of AB members are not supposed to determine dispute settlement outcomes.

If the term "appropriate" in ASCM Article 19.3 (and AD Agreement Article 9.2) is really a license to legislate as this AB division apparently believes, then no area of Members' trade remedy practice is safe from similar meddling. The DSU's directive about decisions not increasing Members' obligations apparently applies only when Members are already behaving in a manner the AB considers "appropriate."

Presented with such a poorly-reasoned decision, an absence of decent compliance options, an increasingly urgent need to stop the runaway train that the AB (at least in this area of its decisional output) has become, and little to be gained by kicking the can down the road, the U.S. government should follow the Nancy Reagan approach pioneered in *US – Gambling*. It should JUST SAY NO.

FROM HERE TO THERE: U.S. EXPORT REFORM

By: Correen E. Wood[*] & William A. Nelson II[*]

United States (U.S.) and international companies all struggle with the ambiguity and regulatory overlap of the current U.S. export control system. The current Administration, in August of 2009, initiated review of the current export control regulations and identified areas to reform the system. The assessment found that the current U.S. export control system is overly complicated, it contains overlaps, and controls are not based on the market availability of products, causing a burden to U.S. manufacturer's ability to sell their products abroad.[4]

President Obama has identified an initiative of export reform to facilitate the growth of the U.S. economy and marketability of U.S. origin goods abroad. The Administration has stated the goal of the reform is an effort to "build high walls around a smaller yard" by focusing enforcement efforts on the "crown jewels."[5] So let's take a moment to look at what is proposed and what is happening in the four identified component areas: Single Primary Enforcement Coordination Agency, Single Control List, Single Information Technology (IT) System, and Single Licensing Agency.

Single Primary Enforcement Coordination Agency

A Single Primary Enforcement Coordination Agency was formed on November 9, 2010 when the President signed Executive Order 13558, establishing a Federal Export Enforcement Coordination Center (FEECC). The issuing policy in the order states that

"[e]xport controls are critical to achieving our national security and foreign policy goals. To enhance our enforcement efforts and minimize enforcement conflicts,

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[4] *See* President's Export Control Reform Initiative, https://www.export.gov/ecr/ (last visited April 6, 2011).

[5] *See* Press Release, The White House, Fact Sheet on the President's Export Control Reform Initiative (April 20, 2010).