

7. UNITED STATES – COUNTERVAILING AND ANTI-DUMPING MEASURES ON CERTAIN PRODUCTS FROM CHINA

A. REPORT OF THE APPELLATE BODY (WT/DS449/AB/R) AND REPORT OF THE PANEL (WT/DS449/R AND WT/DS449/R/ADD.1)

- The United States would first like to thank the Panel, the Appellate Body, and the Secretariat staff assisting them for their work in this proceeding.
- We recall that there were two main issues in this dispute. First, a challenge to Public Law 112-99, the so-called “GPX legislation”, enacted in 2012; second, a challenge to the alleged failure to affirmatively investigate an overlap of remedies with respect to 25 countervailing duty proceedings.
- On the first issue, China has obtained *no WTO findings* of inconsistency in two WTO reports. On the second, the very legislation challenged by China had already directed the U.S. Department of Commerce to look at the overlapping remedies issue. And so, at the end of what has been an intensive litigation process, the United States is left wondering why China considered it fruitful to bring this dispute in the first place.

2012 U.S. Legislation and GATT 1994 Article X:2

- The 2012 legislation was enacted to confirm that the U.S. countervailing duty law could be applied to countries considered non-market economies for purposes of antidumping duty proceedings. Indeed, the U.S. Department of Commerce had been applying the U.S. countervailing duty law to China since 2006, consistent with China’s Protocol of Accession.
- China challenged that democratically and openly enacted U.S. law as contrary to GATT obligations on transparency and fair enforcement. We invite Members to consider how extraordinary those claims were.
- It is uncontested that the U.S. Department of Commerce applied the U.S. countervailing duty law to Chinese imports following notice and comment to all interested parties, including China; that the Department was never ordered by a U.S. court to change its interpretation and application of the countervailing duty law to China; that the U.S. Congress and President enacted the 2012 legislation before any court decision to the contrary; and that, in fact, no change in the actual tariff treatment of any Chinese import resulted from the enactment of the 2012 legislation.
- Given all of these uncontested facts, it is no surprise that *almost all* of China’s claims in relation to the legislation were rejected by the panel or abandoned by China during the panel

proceeding or on appeal. China abandoned the claim in its panel request under Article X:3(a) of the GATT 1994, which relates to uniform, impartial, and reasonable administration; the Panel rejected, and China did not appeal, a claim under Article X:1 of the GATT 1994, which relates to prompt publication; and the Panel rejected, and China did not appeal, its claim under Article X:3(b), which relates to the establishment of mechanisms to ensure the prompt review and correction of administrative decisions on customs matters.

- The only claim on the 2012 legislation that remained on appeal was under GATT 1994 Article X:2. While the United States recognizes both the Panel’s and the Appellate Body’s efforts analyzing numerous legal and factual issues in relation to this claim, respectfully, the Panel appears to have set out a legal analysis that makes better sense of the text of the GATT 1994 and better reflects the appropriate task for a WTO adjudicative body.
- Fundamentally, the Panel understood Article X:2 as being concerned with enforcement of an unpublished change in a trade regime to the detriment of imports. And when the Panel compared the 2012 legislation at issue with the pre-existing rates, requirements, or restrictions on Chinese imports, it found no “advance in a rate of duty or other charge on imports under an established and uniform practice” and no “new or more burdensome requirement, restriction or prohibition on imports.” That is no surprise since the Panel found that, since 2006, the United States had exercised its WTO right to apply CVDs to China and therefore had an “established and uniform practice” of applying the countervailing duty law to Chinese imports.
- On appeal, the Appellate Body reversed the Panel’s legal interpretation of Article X:2 and its approach to how a Member’s municipal law should be understood for purposes of the comparison under Article X:2.
- A number of aspects of the Appellate Body’s interpretation could be discussed, and indeed we recognize that its examination of some aspects of U.S. law was quite detailed. But today we wish to focus on two issues that we consider would merit further thought in future proceedings.
- First, the Appellate Body faults the Panel for allegedly failing to ascertain “the meaning of the U.S. countervailing duty law prior to Section 1 of PL 112-99 directly through its objective assessment” and as a matter of law.<sup>2</sup> And the Appellate Body asserts that this assessment, pursuant to its own findings in *US – Carbon Steel*, entails examining “the text of the relevant legislation or legal instruments, which may be supported, as appropriate, by evidence of the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinions of legal experts and the writings of recognized

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<sup>2</sup> Appellate Body Report, paras. 4.100-4.101, 4.104-4.108.

scholars.”<sup>3</sup> But as the United States and third participants noted in this appeal, when a WTO adjudicative body examines a Member’s municipal law, the meaning must be that which would be given by the municipal law system using the interpretive tools of *that* system – not the generalized tools described by the Appellate Body without reference to the U.S. legal system itself.

- It is striking that in 61 paragraphs of analysis of the meaning of the 2012 U.S. legislation and the pre-existing countervailing duty law, the Appellate Body does not once refer to U.S. constitutional law principles applicable to statutory interpretation, despite the extensive reference to those principles in the Panel Report. This is a critical omission because, as the Panel had found, under principles of U.S. constitutional law, an agency interpretation of legislation is lawful and governs unless it is overturned in a binding court decision applying the standard of review articulated by the U.S. Supreme Court.<sup>4</sup>
- And, therefore, the Panel had also concluded *objectively* that, under U.S. municipal law, the administering agency’s interpretation and application of the U.S. countervailing duty law *was* valid U.S. law as “nothing in the record indicates, that in relation to any of the court decisions submitted to us by the parties, USDOC received an order from a United States court to either change or discontinue its practice of applying United States CVD law to imports from NME countries, or to give a different interpretation to United States CVD law.”<sup>5</sup>
- Regrettably, the Appellate Body’s interpretative approach under Article X:2 ignored a key facet of the municipal legal system of the Member whose domestic law was being examined. This cannot produce a valid comparison under Article X:2.
- A second difficulty with the Appellate Body’s approach is that it could lead to the negative consequence of allowing and encouraging WTO Members to bring disputed domestic law issues for resolution in the WTO rather than in another Member’s domestic courts. In other words, this approach would seem to charge the WTO dispute settlement system with determining what is to be deemed “lawful” under a Member’s domestic legal system using the interpretive tools endorsed by the Appellate Body in *US – Carbon Steel*. Such a

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3 Appellate Body Report, para. 4.123.

4 Panel Report, para. 7.163 (citing to the U.S. Supreme Court decisions in *United States v. Eurodif S.A.*, 555 U.S. 305 (2009), at 316, and *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), at 843) (“[U]nder United States law, even when a court reviews the interpretation of a law that underlies action taken by an agency administering that law, the agency’s interpretation of the law ‘governs in the absence of unambiguous statutory language to the contrary or unreasonable resolution of language that is ambiguous’. This means that, within these limits, a reviewing United States court must defer to the agency’s interpretation rather than impose its own interpretation.”).

5 Panel Report, para. 7.172.

determination could presumably be made in advance of, and perhaps even contrary to, a municipal court decision on the same issue.

- If the WTO dispute system can be used to resolve contested issues of municipal law contrary to that Member's understanding and application of its own law, this could raise unsettling questions on when a Member could be deemed to breach its obligations and would be difficult to reconcile with GATT 1994 Article X:3(b), which requires a Member to establish *domestic* procedures for the prompt review and correction of administrative actions. For this reason, previous panels and this Panel had found that "it is the role of domestic 'judicial, arbitral or administrative tribunals', and not WTO panels, to determine whether agency practices relating to customs matters are unlawful under domestic law."<sup>6</sup>
- The Appellate Body ultimately did not make any findings with respect with the 2012 legislation because it could not complete the analysis under its approach. The United States welcomes the lack of findings on the 2012 legislation because, as the Panel correctly found, as a matter U.S. municipal law, both before and after the 2012 legislation U.S. law has always been that the U.S. Department of Commerce is *not* prohibited from applying the U.S. countervailing duty law to China.

#### "Double Remedies"

- With respect to the so-called "double remedies" issue, which was also at issue in this dispute, the United States is disappointed with the findings in the Panel report on China's claims relating to the concurrent application of countervailing duties and antidumping duties calculated using a nonmarket economy methodology. The United States considers that the Panel's findings do not reflect a correct legal analysis of Article 19.3 of the SCM Agreement, and we have previously expressed concerns with the interpretation underlying this issue.
- Nonetheless, the United States has implemented the WTO's recommendations in an earlier dispute relating to this issue. Because the United States already looks at this issue and makes any necessary adjustments in any determination undertaken after March 13, 2012, the United States chose not to appeal this issue in this dispute, in part to help simplify the dispute and ease burdens on the dispute settlement system.

#### DSU Article 6.2

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<sup>6</sup> Panel Report, para. 7.164. *See also US – Stainless Steel (Korea)*, para. 6.50 (stating that "the WTO dispute settlement system ... was not in our view intended to function as a mechanism to test the consistency of a Member's particular decisions or rulings with the Member's own domestic law and practice; that is a function reserved for each Member's domestic judicial system, and a function WTO panels would be particularly ill-suited to perform. An incautious adoption of the approach advocated by Korea could however effectively convert every claim that an action is inconsistent with domestic law or practice into a claim under the *WTO Agreement*.").

- Finally, while the United States regrets the Appellate Body's conclusion that China's panel request complied with Article 6.2 of the DSU, we recognize the Appellate Body's efforts in grappling with China's vague and imprecise panel request.
- We appreciate the Appellate Body's rejection of relying on an external source beyond the face of the panel request, in this case another WTO report, to determine whether the request provided a sufficient summary of the legal basis of the complaint.

### Conclusion

- In conclusion, in this statement the United States has highlighted some issues of concern in the reports, particularly in relation to Article X:2, that may have unintended consequences for Members and the dispute settlement system and should be considered further. We also would note that none of the findings in this dispute go to the root issue: the provision of subsidies by a WTO Member that are causing material injury to another Member's domestic industries. Those are issues that would, indeed, be worth resolving for the benefit of the world trading system.