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SIDLEY UPDATE

WTO Appellate Body Jurisprudence Has Important Implications for Injury Determinations in Trade Remedy Investigations

The Appellate Body of the World Trade Organization (WTO) has recently issued decisions that make it more difficult for investigating authorities worldwide to reach affirmative injury determinations in trade remedy investigations. Late last year, in *US–Carbon Steel (India)*, the Appellate Body held that the Agreement on Subsidies and Countervailing Measures does "not authorize investigating authorities to assess cumulatively the effects of imports that are not subject to simultaneous countervailing duty investigations with the effects of imports that are subject to countervailing duty investigations" when making injury determinations.[1] And just last week, the Appellate Body released its reports in the *China – HP-SSST (Japan)/China – HP-SSST (EU)* disputes, arguably raising the bar that an investigating authority must satisfy with respect to the "price undercutting" and "impact" components of the injury analysis.[2] This update examines the consequences of the Appellate Body's reports in *China – HP-SSST (Japan)/China – HP-SSST (EU)* for injury determinations in trade remedy investigations.

In *China – HP-SSST (Japan)/China – HP-SSST (EU)*, Japan and the European Union had challenged several aspects of China's measures imposing anti-dumping duties on imports of certain high-performance stainless steel seamless tubes (HP-SSST) as being inconsistent with China's obligations under the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement). The Appellate Body generally agreed with Japan and the European Union and notably so with respect to their arguments that the injury determination made by China's investigating authority was inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement in respect to the price undercutting analysis and Articles 3.1 and 3.4 of the Anti-Dumping Agreement in respect to the impact analysis.

Implications for Price Undercutting Analyses

First, Japan and the European Union argued that the investigating authority erred under Articles 3.1 and 3.2 of the Anti-Dumping Agreement by finding significant price undercutting for Grade C HP-SSST products[3] based solely on the observation that Grade C HP-SSST import prices were mathematically lower than Grade C HP-SSST domestic prices in a single year, 2010, without consideration of any other facts. Such additional facts, as

[1] Appellate Body Report, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, WT/DS436/AB/R, circulated December 8, 2014 (*US–Carbon Steel (India)*).

[2] Appellate Body Reports, *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes (HP-SSST) from Japan/China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes (HP-SSST) from the European Union*, WT/DS454/AB/R/ WT/DS460/AB/R, circulated October 14, 2015 (*China – HP-SSST (Japan)/China – HP-SSST (EU)*).

[3] HP-SSST products may be categorized into three grades, which the Appellate Body referred to as Grade A, Grade B and Grade C. Grade A is the least expensive and lowest-grade product; Grade B is in the middle, in terms of both price and grade; and Grade C is the most expensive and highest-grade product.

noted by the Appellate Body, included the point that Grade C HP-SSST import prices fell below Grade C HP-SSST domestic prices in 2010 because Grade C HP-SSST domestic prices increased by 112.80 percent between 2009 and 2010.

The Appellate Body agreed with Japan and the European Union, explaining that the price inquiry under Article 3.2, including the inquiry into price undercutting, concerns "the effect of the dumped imports on the prices of domestic like products," and the outcome of that inquiry must "serve as a meaningful basis for an investigating authority's determination of injury and causation." Thus, the price undercutting inquiry is not "merely concerned with the question of whether there is a mathematical difference, at any point in time during the [period of investigation (POI)], between the prices of the dumped imports and the comparable domestic products." That is, it does not entail a "static examination" but rather "requires a dynamic assessment of price developments and trends in the relationship between the prices of the dumped imports and those of domestic like products over the duration of the POI." Such an examination "includes assessing whether import and domestic prices are moving in the same or contrary directions, and whether there has been a sudden and substantial increase in the domestic prices."

This interpretation of the Anti-Dumping Agreement indicates that investigating authorities may not find significant price undercutting and then proceed with the remainder of the injury and causation analysis based solely on a superficial observation of import prices that are mathematically lower than domestic prices. Rather, a more rigorous analysis is required for a finding of significant price undercutting consistent with Articles 3.1 and 3.2 of the Agreement.

For example, in the United States, the U.S. International Trade Commission (USITC) undertakes its price undercutting analysis by requesting quarterly pricing data on specific pricing products from U.S. producers and U.S. importers during the POI, which is usually three years. It then proceeds to consider the number of quarters in which import prices are lower than domestic prices and vice versa in its assessment of whether significant price undercutting by subject imports exists. Under this framework, three hypothetical scenarios may be envisioned, each of which results in subject imports underselling domestic like products in 50 percent of the quarterly comparisons: (a) import and domestic prices fluctuate, such that import prices are below domestic prices every other quarter; (b) import prices are above domestic prices for the first six quarters and below domestic prices for the last six quarters as a result of an increase in domestic prices; and (c) import prices are above domestic prices for the first six quarters and below domestic prices for the last six quarters as a result of a decrease in import prices. The Appellate Body's decision in *China – HP-SSST (Japan)/China – HP-SSST (EU)* suggests that the USITC could not find significant price undercutting to exist in all three of these scenarios simply because subject imports undersell domestic like products in 50 percent of the quarterly comparisons. Rather, the USITC must examine the price developments and trends over the duration of the POI, making it more difficult for the USITC to conclude that significant price undercutting exists in scenarios (a) and (b) as compared with scenario (c).

Implications for Impact Analyses

Second, Japan and the European Union argued that the investigating authority erred under Articles 3.1 and 3.4 of the Anti-Dumping Agreement by failing to take into account the results of its volume and price effects inquiries in its analysis of the impact of dumped imports on the domestic industry. Specifically, under the facts of the case, the investigating authority found no increase in the volume of HP-SSST imports from Japan and the

European Union, and it found significant price undercutting by only Grade B and Grade C HP-SSST imports—which accounted for the bulk of HP-SSST imports—while the majority of Chinese HP-SSST production was of Grade A products. Nonetheless, the investigating authority concluded that dumped HP-SSST imports had an impact on the domestic industry based simply on its examination of the financial and economic indicators of the domestic industry as a whole.

The Appellate Body agreed with Japan and the European Union that the investigating authority's impact analysis was inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement. The Appellate Body explained that the results of the volume and price effects inquiries are relevant to the impact analysis under Article 3.4, because all the provisions of Article 3 "are interlinked and logically progress to answering the question of whether the dumped imports are causing injury to the domestic industry." It added that Article 3.4 "does not merely require an examination of the state of the domestic industry, but contemplates that an investigating authority 'must derive an understanding of *the impact of* subject imports on the basis of such an examination.'"[4] Therefore, "[d]epending on the particular circumstances of each case, an investigating authority may . . . be required to take into account, as appropriate, the relative market shares of product types with respect to which it has made a finding of price undercutting; and, for example, the duration and extent of price undercutting, price depression or price suppression, that it has found to exist."

This indicates that investigating authorities may not conduct their impact analyses simply by examining the financial and economic indicators of the domestic industry in isolation from the results of their volume and price effects analyses. That is, if an investigating authority finds that imports of only certain grades of the product under consideration exhibited an increase in volume or price effects during the POI, it must consider as part of its impact analysis whether those imports could plausibly explain the observed state of the domestic industry, which may also produce other grades of the product, to reach an impact determination consistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement.

Impact analyses by investigating authorities in regions such as the United States and European Union are done on a case-by-case basis. Therefore, whether an investigating authority's impact analysis logically progresses from the results of its volume and price effects analyses in a WTO-consistent manner requires a case-specific assessment.

Conclusion

The Appellate Body's decision in *China – HP-SSST (Japan)/China – HP-SSST (EU)* arguably raises the bar that an investigating authority must satisfy with respect to its price undercutting and impact analyses before rendering an affirmative injury determination in a trade remedy investigation so as not to run afoul of its obligations under Article 3 of the Anti-Dumping Agreement. This decision follows other recent Appellate Body jurisprudence that similarly makes it more difficult for an investigating authority to render an affirmative injury determination, such as the prohibition on cross-cumulation set forth by the Appellate Body in *US–Carbon Steel (India)*.

As a result of this recent WTO jurisprudence, respondents involved in trade remedy investigations should seek counsel to ensure that appropriate arguments are advanced before an investigating authority to ensure that the authority acts in accordance with its WTO obligations.

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[4] Emphasis in original.

If you have any questions regarding this Sidley Update, please contact the Sidley lawyer with whom you usually work, or

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