US & Multilateral Trade Policy Developments

Japan External Trade Organization

November 2017

Contents

US General Trade Policy Highlights

US Department of Commerce Issues Affirmative Preliminary Determination, Confirms Non-Market Economy Status of China in Antidumping Investigation of Aluminum Foil

On October 27, 2017, the US Department of Commerce (DOC) announced its affirmative preliminary determination in the antidumping duty investigation concerning imports of aluminum foil from China. In its investigation, DOC preliminarily determined that imports of aluminum foil from China were sold in the United States at dumping margins ranging from 96.81 to 162.24 percent. As part of its investigation, DOC also conducted an inquiry into China's status as a non-market economy (NME) country for purposes of the U.S. antidumping law and concluded that China remains an NME country "because it does not operate sufficiently on market principles to permit the use of Chinese prices and costs for purposes of the Department's antidumping analysis." DOC therefore will continue to use NME methodologies in antidumping investigations of imports from China.

DOC's memorandum on its inquiry into China's NME status did not address claims by the Government of China, among other parties, that WTO Members are now obligated to use standard methodologies in anti-dumping determinations targeting Chinese products after the December 11, 2016 expiration of certain provisions of China's Protocol of Accession to the WTO.[1]

Background

DOC initiated the antidumping investigation of aluminum foil from China on March 28, 2017. On April 3 DOC announced that, as part of the investigation, it would initiate an inquiry into China's status as an NME country. DOC initiated the inquiry pursuant to Section 771(18)(C)(ii) of the Tariff Act of 1930, which states that DOC may make a determination with respect to a country's NME status "at any time". DOC stated that it was conducting the inquiry "to solicit and collect the most recent information following the December 11, 2016, change in the PRC's Protocol of Accession to the World Trade Organization." DOC then solicited public comments with respect to the six factors enumerated by Section 771(18)(B) of the Tariff Act, which the Department must take into account in making a market/nonmarket economy determination:

1. The extent to which the currency of the foreign country is convertible into the currency of other countries;
2. The extent to which wage rates in the foreign country are determined by free bargaining between labor and management;
3. The extent to which joint ventures or other investments by firms of other foreign countries are permitted in the foreign country;
4. The extent of government ownership or control of the means of production;
5. The extent of government control over allocation of resources and over price and output decisions of enterprises; and
6. Such other factors as the administering authority considers appropriate.

In response to DOC's request, China's Ministry of Commerce (MOFCOM) filed a two-page position paper in which it explained that it would not submit comments with respect to the six statutory criteria because, in its view, "under the WTO Agreements, it is irrelevant whether the Department considers that China is a 'non-market economy' under the criteria set forth in § 771(18) of the Tariff Act of 1930. In no event would such a determination allow the United States to determine normal value in investigations of Chinese products other than in accordance with the applicable

[1] DOC's memorandum on the inquiry into China's non-market economy status is attached for reference.

provisions of the Anti-Dumping Agreement and the GATT 1994." MOFCOM also reiterated its position that the United States, as a WTO Member, was obligated to cease the use of its "surrogate" methodology, which it applies to NME imports, in all anti-dumping determinations against Chinese products after December 11, 2016.

Several other parties – including Members of Congress, labor organizations, and groups representing the US steel, aluminum, solar products, and paper industries – filed comments urging DOC to continue classifying China as an NME country.

DOC findings

On October 30, DOC released its memorandum on the inquiry, in which it concluded that China remains an NME country for purposes of the U.S. antidumping law. DOC stated that its conclusion was based on its analysis of the six statutory factors, which may be summarized as follows:

- Under Factor 1, DOC found that the Chinese government "still maintains significant restrictions on capital account transactions and intervenes considerably in onshore and offshore FOREX markets";
- Under Factor 2, DOC stated that it "continues to find significant institutional constraints on the extent to which wage rates are determined through free bargaining between labor and management";
- Under Factor 3, DOC stated that "the Chinese government's foreign investment regime is particularly restrictive relative to that of other major economies";
- Under Factor 4, DOC stated that "the Chinese government continues to exert significant ownership and control over the means of production, as demonstrated by (1) the role and prevalence of state-invested enterprises…throughout the enterprise sector and (2) the system of land ownership and land-use rights";
- Under Factor 5, DOC stated that "the Chinese government plays a significant role in resource allocations", and that "the Chinese government exerts a high degree of control over prices it deems essential or strategic"; and
- Under Factor 6, DOC stated that "China's legal system continues to function as an instrument by which the Chinese government and the CCP can secure discrete economic outcomes, channel broader economic policy, and pursue industrial policy goals."

DOC's memorandum briefly summarized, but did not substantively address, the issues raised in the MOFCOM submission (namely, whether WTO rules permit a Member to continue using surrogate country methodologies in anti-dumping determinations against Chinese products after December 11, 2016). A MOFCOM official on October 29 denounced DOC's decision and reiterated the Chinese government's position that, after December 11, 2016, WTO rules require investigating authorities to use standard methodologies, which use the prices and costs reported by Chinese companies (rather prices and costs in third countries), to calculate anti-dumping duties on Chinese imports.

China in December 2016 requested consultations with the United States in the WTO, alleging that Sections 771 and 773 of the Tariff Act (which permit DOC to use third- country prices to calculate the normal value of exports from NME countries) are inconsistent with U.S. obligations under the WTO Anti-Dumping Agreement and the GATT 1994, and that these alleged inconsistencies "ceased to be justifiable when Section 15(a)(ii) of the Protocol expired on 11 December 2016."[2] The dispute remains in the consultation stage, however, as China has not yet requested the establishment of a panel.

[2] United States – Measures Related to Price Comparison Methodologies (DS515).

US Issues New Findings on "Particular Market Situation" in Biodiesel and Softwood Lumber Investigations

On October 23, 2017, the US Department of Commerce (DOC) announced its affirmative preliminary determinations in the anti-dumping duty investigations of imports of biodiesel from Argentina and Indonesia. Both determinations included an affirmative finding of a "particular market situation" (PMS), which, under a recently-amended provision of the U.S. anti-dumping law, permits DOC to reject respondent exporters' home market sales prices and actual raw material costs when calculating dumping, and to instead use undefined methodologies. Although this is just a preliminary determination, it could have significant implications for exporters from all "market economy" countries, particularly those with industries subject to significant government intervention. First, it is the first original investigation in which DOC has made affirmative PMS findings pursuant to a standard process, thereby indicating a change in U.S. policy as opposed to an isolated event. Thus, DOC's decisions in the biodiesel investigations are likely to serve as precedent for future U.S. investigations involving PMS allegations. Second, by utilizing a methodology that is similar to what DOC applies for "non-market economy" (NME) countries like China, the PMS findings significantly increased dumping margins on the subject imports of biodiesel from Argentina and Indonesia, which are both market economies. Finally, DOC's PMS system might influence other countries' use of similar anti-dumping methodologies to address perceived "market distortions" caused by government intervention, particularly given the current controversies surrounding the application of NME methodologies to China.

On the other hand, DOC's recent affirmative final determination in a different antidumping investigation – *Certain Softwood Lumber Products from Canada* – included a negative finding of particular market situation. DOC's negative findings in *Softwood Lumber* indicate that the agency's PMS analyses are likely to be case-specific, depending on the allegations and facts of record. The case also illustrates the complications that may arise regarding potential "double remedies" when PMS allegations made in an anti-dumping investigation involve alleged subsidy programs that also are at issue in a concurrent countervailing duty investigation of the same merchandise.

Background

Under 2015 amendments to the US anti-dumping law, DOC when calculating normal value may, upon finding the existence of a "particular market situation," (1) reject exporters' home market sales prices for the subject merchandise (as "outside the ordinary course of trade"); and (2) adjust exporters' raw material costs, or replace them with proxy values. This outcome increases dumping margins and, ultimately, anti-dumping duty rates. DOC has explained that it has wide discretion to interpret "particular market situation," and until now had applied it in only one case (the anti-dumping duty administrative review of *Oil Country Tubular Goods (OCTG) from Korea*) where the totality of the evidence, including government intervention in the exporters' domestic energy market, demonstrated "distortions which impact the cost of production" of the merchandise under investigation.

Preliminary Determinations in Biodiesel from Argentina and Indonesia

DOC's PMS findings, and their impact on DOC's determination of normal value, followed a similar pattern in both biodiesel investigations:

- **Rejection of home market biodiesel sales prices.** DOC found that a PMS exists in the domestic biodiesel market due to the government's regulation of biodiesel prices and sales (including specific sales quotas or "must-sell" requirements), thereby rendering all home market biodiesel sales to be "outside the ordinary course of trade" and thus unusable for normal value.

- **Use of "constructed value" (CV).** DOC declined to use third-country sales prices as normal value and instead used CV, due to the aforementioned PMS in biodiesel. DOC did not elaborate on this choice, chalking up its

decision simply to following "long-standing practice" of using CV when the agency finds that there are no home market sales of the subject merchandise within the ordinary course of trade.

- **Rejection of exporters' record costs for the product's primary input.** DOC found that another PMS exists in the domestic market for biodiesel's main input (palm oil in Indonesia and soybeans in Argentina) due to export taxes and levies that depress domestic input prices, putting them well below world market prices.

- **Adjustment of record input costs for CV.** Because of this PMS, DOC adjusted the exporters' cost of production to account for the "distorted" domestic prices for soybeans (Argentina) or palm oil (Indonesia), by substituting in the CV calculation a (higher) "market determined price" for the price respondent exporters actually paid for the input in question.

DOC's affirmative PMS findings appear to have significantly increased dumping margins, which ranged from approximately 54% to 70% for Argentina and were approximately 50% for Indonesia.

Final Determination in Certain Softwood Lumber Products from Canada

On November 2, DOC issued an affirmative final determination in the anti-dumping investigation of *Certain Softwood Lumber Products from Canada,* which included a negative finding of PMS. The petitioner in *Softwood Lumber* had alleged that the following policies of the Government of Canada (GOC) resulted in "distortions" that affected the cost of production (COP) of the subject merchandise, and that the totality of these distortions represented a single PMS in Canada, *i.e.*, that "the sale of lumber byproducts in Canada are outside the ordinary course of trade and, therefore, should not be accounted for in the Department's normal value calculations":

1. Subsidization of sawmills' residual markets (*e.g.*, bioenergy programs) that consume byproducts generated in the production of subject merchandise;

2. Subsidization of, and involvement in, Canada's electricity market; and

3. Subsidization of logs (*i.e.*, stumpage).

DOC rejected the first allegation, citing evidence provided by the respondents which demonstrated that (1) bioenergy programs are not a "significant market" for lumber byproduct sales; (2) during the period of investigation, the vast majority of lumber byproducts continued to be sold to, and consumed by, the pulp and paper industry (*i.e.*, the "primary and long-standing consumer" of lumber byproducts); and (3) the prices of one byproduct (wood chips) had been consistent for the past ten years, showing "no significant distortions or fluctuations[.]" DOC also stated that, although certain other lumber byproducts were used in the production of bioenergy, "petitioner has provided no record evidence to support a finding that the market for these byproducts was in any way impacted by the GOC initiatives at issue." DOC therefore determined that record evidence did not support the assertion that bioenergy programs impacted the demand for, or price of, lumber byproducts, such that the COP for lumber was "outside the ordinary course of trade." Accordingly, DOC issued a negative PMS finding and did not address the remaining allegations regarding electricity and stumpage (noting that the petitioner had alleged a single PMS based on the "totality" of the three GOC actions).

Because DOC did not address the PMS allegations regarding electricity and stumpage, it decided not to address respondents' arguments that these allegations were duplicative of claims being investigated in the concurrent countervailing duty investigation of the same merchandise from Canada, and could therefore lead to the imposition of "double remedies" (*i.e.*, the application of both anti-dumping and countervailing duties to offset the same alleged

subsidization). DOC noted in its determination that double remedies are prohibited under Article VI.5 of the GATT 1994 (which states that "no product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to both anti-dumping and countervailing duties to compensate for the same situation of dumping or export subsidization)[1], and that this requirement is implemented into U.S. law, which requires DOC to increase the export price of the subject merchandise by "the amount of any countervailing duty imposed on the subject merchandise. . . to offset an export subsidy."[2] DOC also stated in its final determination that "outside the context of export subsidies, a determination of the existence, or lack thereof, of a 'double remedy' is largely dependent on the facts before the Department in the proceedings at issue." However, as noted above, DOC declined to address the issue of double remedies in its final determination, having made a negative PMS finding.

Implications

Though DOC previously made an affirmative PMS finding in *OCTG from Korea*, its findings in the biodiesel and softwood lumber investigations are likely more indicative of how DOC will approach PMS allegations in future cases. DOC's process in *OCTG from Korea* was unusual: DOC issued a negative preliminary finding of PMS, but reversed this finding in the final determination despite the fact that no new evidence had been submitted following the preliminary determination (*please refer to the W&C US Trade Alert dated April 14, 2017*). DOC then explained that it had reversed the decision because, during the course of the investigation, it amended its standard for determining whether a "particular market situation" exists, *i.e.*, by deciding to analyze various pieces of evidence "as a whole" instead of as individual factors. By contrast, the investigations of biodiesel and softwood lumber are the first in which DOC has made PMS findings pursuant to predetermined methodologies and standards, and this approach is more likely to be replicated by DOC in future investigations.

On one hand, DOC's findings in *Biodiesel from Argentina and Indonesia* reflect the increasing willingness of the United States authorities (among other jurisdictions, such as the EU) to rely on alternative anti-dumping calculation methodologies in order to offset alleged economic distortions in "market economy" countries. Such methodologies have the effect of increasing dumping margins, as was demonstrated by the final determination. On the other hand, DOC's final determination in *Softwood Lumber* indicates that the agency's PMS analyses are likely to be case-specific, depending on the specific allegations and facts of record. For example, DOC may be more willing to find a PMS where government intervention or other actions directly affect the subject merchandise and/or its primary input (*e.g.*, biodiesel and soybeans/ palm oil), as opposed to a byproduct of the subject merchandize (*e.g.*, wood chips). Moreover, although DOC did not decide on the issue in *Softwood Lumber*, it did not reject arguments that using both the PMS provision and countervailing duties to offset the same subsidization of the same merchandise would constitute a "double remedy".

DOC's PMS findings in the biodiesel case may be challenged at the WTO, and the Argentine government already has indicated that it is considering initiating a WTO dispute if final anti-dumping duties are imposed. However, the first WTO review of the new US law could actually come as part of China's broader dispute with the United States over the continued application of "non-market economy" treatment to Chinese imports. The request for consultations in that dispute – *United States — Measures Related to Price Comparison Methodologies* (DS515) – alleges that the new U.S. legal provision on PMS is inconsistent with, *inter alia*, Articles 2.1 and 2.2 of the Anti-Dumping Agreement and GATT Article VI:1. If China requests the establishment of a panel in DS515, as is expected, it could be the first WTO dispute to expressly cover the new U.S. law on PMS.

US Trade Representative Requests Supplemental Report from US International Trade Commission in Safeguard Investigation of Crystalline Silicon Photovoltaic Cells

On November 27, 2017, US Trade Representative (USTR) Robert Lighthizer requested a supplemental report from the US International Trade Commission (ITC) to assist the President in making a determination in the global safeguard investigation concerning imports of crystalline silicon photovoltaic cells (CSPV), whether or not partially or fully assembled into other products.[3] The ITC submitted its initial report to the President in this investigation on November 13, 2017.

Ambassador Lighthizer's letter requests additional information from the ITC in the form of a supplemental report that identifies "any unforeseen developments that led to the articles at issue being imported into the United States in such increased quantities as to be a substantial cause of serious injury." In the last WTO dispute involving U.S. safeguard measures (on certain steel products), the WTO Appellate Body found that the U.S. measures were inconsistent with Article XIX:1(a) of the GATT 1994 and Article 3.1 of the Agreement on Safeguards because the United States "failed to provide a reasoned and adequate explanation demonstrating that 'unforeseen developments' had resulted in increased imports causing serious injury to the relevant domestic producers".[1]

Pursuant to section 203(a)(5) of the Trade Act of 1974, the ITC must provide the additional information requested by Ambassador Lighthizer within 30 days (*i.e.*, by December 27, 2017) and the President must make a final determination in the investigation within 30 days after receiving the additional information (*i.e.*, by January 26, 2018, at the latest). Absent Ambassador Lighthizer's request, the President's determination would have been due by January 12, 2018. USTR will hold a public hearing on December 6, 2017, at which interested parties will be able to submit views and evidence on the appropriateness of the safeguard measures recommended by the ITC.

[3] A copy of Ambassador Lighthizer's letter is attached for reference.

Petitions and Investigations Highlights

US Department of Commerce Issues Affirmative Preliminary Determinations in AD Investigations of Tool Chests and Cabinets from China and Vietnam

On November 13, 2017, the US Department of Commerce (DOC) announced its affirmative preliminary determinations in the antidumping duty (AD) investigations concerning imports of tool chests and cabinets from China and Vietnam.[4] In its investigations, DOC preliminarily determined that imports of the subject merchandise were sold in the United States at the following dumping margins:

Country	Exporter/Producer	Dumping Margin
China	Geelong Sales (Macao Commercial Offshore) Limited	168.93 percent
	The Tongrun Single Entity	90.40 percent
	Non-Selected Separate Rate Respondents	145.99 percent
	China-Wide Rate	168.93 percent
Vietnam	The Clearwater Metal Single Entity	230.31 percent
	Vietnam-Wide Rate	230.31 percent

As a result of the preliminary affirmative determinations, DOC will instruct US Customs and Border Protection (CBP) to require cash deposits based on these preliminary rates.

The products covered by the investigation are certain metal tool chests and tool cabinets, with drawers, from China. The scope covers all metal tool chests and cabinets, including top chests, intermediate chests, tool cabinets and side cabinets, storage units, mobile work benches, and work stations that have the following physical characteristics: (1) a body made of carbon, alloy, or stainless steel and/or other metals; (2) two or more drawers for storage in each

[4] Click **here** to view the DOC fact sheet on these investigations.

individual unit; (3) a width (side to side) exceeding 15 inches for side cabinets and exceeding 21 inches for all other individual units but not exceeding 60 inches; (4) a body depth (front to back) exceeding 10 inches but not exceeding 24 inches; and (5) prepackaged for retail sale. Merchandise subject to the investigations is classified under HTSUS categories 9403.20.0021, 9403.20.0026, 9403.20.0030 and 7326.90.8688, but may also be classified under HTSUS category 7326.90.3500.

DOC is scheduled to announce its final determinations in March 2018. If DOC makes affirmative final determinations, and the US International Trade Commission (ITC) makes affirmative final determinations that that imports of tool chests and cabinets from China and Vietnam materially injure, or threaten material injury to, the domestic industry, DOC will issue AD orders.

In 2016, imports of tool chests and cabinets from China and Vietnam were valued at an estimated USD 230 million and 77 million, respectively.

US Department of Commerce Issues Affirmative Final Determinations in AD and CVD Investigations of Hardwood Plywood Products from China

On November 13, 2017, the US Department of Commerce (DOC) announced its affirmative final determinations in the antidumping (AD) and countervailing duty (CVD) investigations concerning imports of hardwood plywood products from China.[5] In these investigations, DOC determined that imports of the subject merchandise from China were sold in the United States at dumping margins ranging from 171.55 to 183.36 percent and received countervailable subsidies ranging from 22.98 to 194.90 percent.

The merchandise subject to the investigation is hardwood and decorative plywood, and certain veneered panels. For purposes of the investigation, hardwood and decorative plywood is defined as a generally flat, multilayered plywood or other veneered panel, consisting of two or more layers or plies of wood veneers and a core, with the face and/or back veneer made of non-coniferous wood (hardwood) or bamboo. A full description of the scope and the Harmonized Tariff Schedule of the United States (HTSUS) subheadings applicable to the subject merchandise are provided in the DOC fact sheet on the investigation.

The US International Trade Commission (ITC) is scheduled to announce its final determination in this investigation on or around December 21, 2017. If the ITC makes an affirmative final determination that imports of hardwood plywood products from China materially injure or threaten material injury to the domestic industry, DOC will issue AD and CVD orders.

According to DOC, imports of hardwood plywood products from China in 2016 were valued at an estimated USD 1.12 billion.

US International Trade Commission Announces Remedy Recommendations in Safeguard Investigation of Large Residential Washers

On November 21, 2017, the US International Trade Commission (ITC) announced the remedy recommendations that it will forward to the President in the global safeguard investigation concerning imports of large residential washers (LRW).[6] All four Commissioners recommended that the President establish a tariff-rate quota (TRQ) on imports of LRW and covered LRW parts for a period of three years. In addition, two Commissioners recommended the imposition of an in-quota tariff on LRW imports. These recommendations are summarized below.

[5] Click **here** to view the DOC fact sheet on these investigations.

[6] Click **here** to view the ITC's announcement and **here** to view the statements of the Commissioners regarding the remedy recommendations.

Recommendations regarding LRW

All four Commissioners recommended that the President impose a TRQ on imports of LRW for a period of three years. The quota would be set at 1.2 million units for the first year and would remain unchanged during the three-year period. Chairman Rhonda K. Schmidtlein and Commissioner Irving A. Williamson also recommended an in-quota tariff of 20 percent for the first year, which would decrease to 18 percent in the second year and 15 percent in the third year, in addition to the current rate of duty. Vice Chairman David S. Johanson and Commissioner Meredith M. Broadbent did not recommend any in-quota tariff. All four Commissioners recommended an above-quota tariff of 50 percent for the first year (in addition to the current rate of duty), which would decrease by 5 percentage points during each subsequent year of the remedy period.

Recommendations regarding covered LRW parts

All four Commissioners recommended that the President impose a separate TRQ on imports of covered LRW parts for a duration of three years. For U.S. imports of covered parts that exceed 50,000 units, the Commissioners recommended a tariff rate of 50 percent, in addition to the current rate of duty. They recommended that the in-quota volume increase by 20,000 units in each year of the remedy period, and that the above-quota tariff rate decrease by five percentage points each year.

Recommendations regarding imports from FTA countries

Having made negative findings with respect to imports from Canada and Mexico under section 311(a) of the North American Free Trade Agreement Implementation Act, the Commissioners recommended that imports from Canada and Mexico be excluded from the above TRQs and increased rates of duty. The Commissioners also recommended that the above TRQs and increased rates of duty not apply to imports from Australia, Colombia, Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, Israel, Jordan, Korea, Nicaragua, Panama, Peru, and Singapore, or to imports from the beneficiary countries under the Caribbean Basin Economic Recovery Act.

Next steps

The Commission will forward its report, which will contain its injury determination, remedy recommendations, certain additional findings, and the basis for them, to the President by December 4, 2017. Once the ITC submits its report, the President will have 60 days to decide whether to implement the ITC's recommendations, take alternative action, or take no action.

WTO & Multilateral Highlights

WTO Appellate Body Issues Report in Indonesia – Importation of Horticultural Products, Animals and Animal Products (DS477, DS478)

The WTO Appellate Body has ruled that certain import licensing measures maintained by Indonesia constitute impermissible import restrictions under Article XI:1 of the General Agreement on Tariffs and Trade (GATT) 1994.

Significance of Decision

The Appellate Body has accepted a new interpretive approach to the key exceptions provision of GATT Article XX.

Traditionally, panels have determined (i) whether a measure was "provisionally justified" under one the specific exceptions of GATT Article XX (*e.g.*, health); and, if so, (ii) would then consider whether the measure was being applied in a non-discriminatory way under the "chapeau", or opening paragraph, of that provision. For some of the measures in the current case, the panel examined the chapeau first, and then rejected the Article XX defence without considering the applicability of the specific paragraphs.

The Appellate Body rejected Indonesia's argument that this constituted an error of law. It found that depending on the case, "a panel that deviates from the sequence of analysis under Article XX might not necessarily, for that reason alone, commit a reversible legal error provided the panel has made findings on those elements under the applicable paragraphs that are relevant for its analysis of the requirements of *chapeau*". Such a ruling introduces an element of uncertainty into the interpretation of GATT Article XX.

In *US – Gasoline*, the Appellate Body's first decision, the tribunal stated that the chapeau was "animated by the principle that while the exceptions of Article XX may be invoked as a matter of legal right, they should not be so applied as to frustrate or defeat the legal obligations of the holder of the right under the substantive rules of the General Agreement". It will often be difficult for panels to determine if a measure can be upheld under the chapeau before ruling first on whether one of the specified exceptions even applies. Moreover, making "findings on those elements under the applicable paragraphs that are relevant for its analysis of the requirements of *chapeau*" is not the same as a panel rendering a determination on whether one of the enumerated exceptions validly applies. These are distinct issues that require separate findings. In some cases, such an approach could frustrate the ability of WTO Members to prove that the exception applies "as a matter of legal right".

Thus, what had previously been a clear analytical approach to analyzing an exception under GATT Article XX is now less certain. However, most future panels are likely to continue to follow the traditional, sequenced approach. As the Appellate Body acknowledged in the current appeal, "following the normal sequence of analysis under Article XX provides panels with the necessary tools to assess the requirements of the *chapeau*".

Analysis

Background: Panel ruling against Indonesia's import licensing measures

The United States and New Zealand challenged 18 import licensing measures imposed by Indonesia for horticultural, animal, and animal products. It found that all of these measures constituted import restrictions under Article XI:1 of the GATT 1994. The Panel rejected Indonesia's defences under GATT Article XX. The Panel declined to rule on the claims under Article 4.2 of the Agreement on Agriculture on the grounds that GATT Article XI:1 dealt more specifically with quantitative restrictions on agricultural products.

GATT Article XI:1 and Article 4.2 of the Agreement on Agriculture "apply cumulatively"

The complainants in this dispute argued that Indonesia's measures violated both GATT Article XI:1 and Article 4.2 of the Agreement on Agriculture.

GATT Article XI:1 provides in part that "No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through… import… licences or other measures", may be imposed on imported goods. Article 4.2 of the Agreement on Agriculture sets out the obligation that "Members shall not maintain, resort to, or revert to any measures of the kind which have been required to be converted into ordinary customs duties...." Footnote 1 to the provision provides a list of impermissible measures, including "quantitative import restrictions", although it specifically excludes any "measures maintained under… other general, non-agriculture-specific provisions of GATT 1994[.]"

The Panel found that GATT Article XI:1 "deals specifically with quantitative restrictions", while Article 4.2 had a "broader scope" because it refers to measures other than quantitative restrictions. The Panel thus commenced its assessment with GATT Article XI:1 and, having found that all of the challenged measures breached that provision, declined to rule on the claims under Article 4.2.

On appeal, Indonesia argued that the Panel erred by assessing the claims under GATT Article XI:1 rather than Article 4.2 of the Agreement on Agriculture. Among other things, Indonesia invoked Article 21.1 of the Agreement on Agriculture to argue that Article 4.2 of that Agreement was *lex specialis* (a more specific legal provision) and that Article 4.2 should have been applied to the exclusion of GATT Article XI:1. The Appellate Body rejected this argument.

Article 21.1 of the Agreement on Agriculture provides in part that "[t]he provisions of GATT 1994… shall apply subject to the provisions of this Agreement". The Appellate Body recalled its earlier ruling in *EC – Export Subsidies on Sugar* that "Members explicitly recognized that there may be conflicts between the Agreement on Agriculture and the GATT 1994, and explicitly provided, through Article 21, that the Agreement on Agriculture would prevail to the extent of such conflicts".

However, the Appellate Body found that there was no conflict between GATT Article XI:1 and Article 4.2. It said that "[a]lthough Article 4.2 of the Agreement on Agriculture generally applies to: "a broader range of measures" and "a narrower scope of products" than GATT Article XI:1, "both provisions prohibit Members from maintaining quantitative import restrictions on agricultural products". It added that a "measure constituting a quantitative import restriction on agricultural products would therefore be inconsistent with both Article XI:1 and Article 4.2".

The Appellate Body ruled that "Article 4.2 of the Agreement on Agriculture does not apply "to the *exclusion* of" Article XI:1 of the GATT 1994 in relation to the claims challenging the 18 measures at issue as quantitative restrictions" (original emphasis). Both provisions contained "the same substantive obligations in relation to these claims and, thus, in these circumstances, they apply cumulatively".

No shifting of the burden of proof

Indonesia argued that the Panel erred in determining that Indonesia bore the burden of proof under the footnote to Article 4.2 of the Agreement on Agriculture. Indonesia argued that as GATT Article XX is one of the "general, non-agriculture-specific provisions of GATT 1994", it was "not possible for a complainant to present a *prima facie* case of violation under Article 4.2 without offering any evidence or argumentation that the challenged measure is not justified under Article XX of the GATT 1994".

The Appellate Body rejected Indonesia's argument. It reasoned that "given that footnote 1 to Article 4.2 incorporates Article XX by reference without modifying the nature of this provision as an affirmative defence, it would follow that the burden of proof under Article XX remains with the respondent in the context of Article 4.2". It added that "[w]hile the complainant challenging a measure under Article 4.2 is required to demonstrate that the measure falls within the categories of measures prohibited under Article 4.2, it is the respondent who benefits from a showing that the measure *additionally* satisfies the requirements of Article XX and therefore is not prohibited under Article 4.2" (original emphasis).

The Appellate Body therefore affirmed the Panel's finding that the burden of proof under Article XX, referred to in footnote 1 to Article 4.2 of the Agreement on Agriculture, "rests on Indonesia".

Treaty conflict: "adherence to the one provision will lead to a violation of the other provision"

While GATT Article XI:1 prohibits quantitative restrictions on imported goods, there are certain exceptions set out in Article XI:2. GATT Article XI:2(c) exempts import restrictions on agricultural and fisheries products that operate to remove a temporary surplus of certain domestic products. Indonesia took the position that some its measures were "necessary to remove a temporary surplus of certain horticultural products, animals and animal products in Indonesia's domestic market". It argued that the Panel erred by finding that GATT Article XI:2(c) had been rendered "inoperative" by Article 4.2 of the Agreement on Agriculture.

The Appellate Body rejected this argument. It recalled that the measures prohibited under Article 4.2 did not include those maintained under general, non-agriculture-specific provisions of GATT 1994. It noted that Article XI:2(c) "does not qualify as a "general, non-agriculture-specific provision[]" because it is "agriculture-specific" in the sense that its

application is limited to "*agricultural* or fisheries product" in express terms" (original emphasis). According to the Appellate Body, "[w]hile it is the function of Article XI:2(c) to carve out certain quantitative restrictions from the *prohibition* contained in Article XI:1, this does not change the fact that they are quantitative restrictions" within the meaning of Article 4.2 of the Agreement on Agriculture (original emphasis).

The Appellate Body disagreed with Indonesia that agricultural measures maintained under GATT Article XI:2(c) were not "quantitative import restrictions" within the meaning of footnote 1 to Article 4.2 of the Agreement on Agriculture. It ruled that "[a]s a consequence, Members cannot maintain quantitative import restrictions on agricultural products that satisfy the requirements of Article XI:2(c) of the GATT 1994 without violating Article 4.2 of the Agreement on Agriculture".

The Appellate Body then referred to Article 21.1 of the Agreement on Agriculture, quoted above, found that "[t]here *is* a conflict between Article XI:2(c) and Article 4.2 because quantitative import restrictions on agricultural products that fall within the permission under the former provision cannot be maintained without violating the latter provision" (original emphasis). It referred to one of its earlier decisions that defined a "conflict" as "a situation where adherence to the one provision will lead to a violation of the other provision". It concluded that "in accordance with Article 21.1 of the Agreement on Agriculture, Article XI:2(c) cannot be applied to justify or exempt measures that fall within the prohibition of quantitative import restriction under Article 4.2".

GATT Article XX: failure to follow "normal sequence of analysis" is not necessarily error

Indonesia also argued that the Panel erred in dismissing its defences under the exceptions provided for under GATT Article XX. Specifically, Indonesia challenged the fact that the Panel assessed whether certain measures met the requirements of the chapeau of Article XX, "without first examining whether these measures were provisionally justified under the applicable paragraphs of Article XX".

The Appellate Body began its analysis of this argument by recalling "Members can resort to Article XX as an exception to justify measures that would otherwise be inconsistent with GATT obligations". It noted that "Article XX is made up of two main parts": "(i) ten paragraphs, which enumerate the various categories of "governmental acts, laws or regulations which WTO Members may carry out or promulgate in pursuit of differing legitimate state policies or interests outside the realm of trade liberalization"; and (ii) the *chapeau*, which imposes additional disciplines on measures that have been found to be provisionally justified under one of the paragraphs of Article XX".

The Appellate Body stated that the "the normal sequence of analysis under Article XX of the GATT 1994 involves, first, an assessment of whether the measure at issue is provisionally justified under one of the paragraphs of Article XX and, second, an assessment of whether that measure also meets the requirements of the *chapeau* of Article XX". This reflects "the fundamental structure and logic of Article XX". At the same time, it found "a panel that deviates from the sequence of analysis under Article XX might not necessarily, for that reason alone, commit a reversible legal error provided the panel has made findings on those elements under the applicable paragraphs that are relevant for its analysis of the requirements of the *chapeau*". The Appellate Body acknowledged that "following the normal sequence of analysis under Article XX provides panels with the necessary tools to assess the requirements of the *chapeau*".

The Appellate Body therefore declined to rule on Indonesia's claims under Article XX.

The Report of the WTO Appellate Body in *Indonesia – Importation of Horticultural Products, Animals and Animal Products* (DS477, DS478) was released on 9 November 2017.

WHITE & CASE

whitecase.com