

Trade & Manufacturing Alert

WTO Appellate Body Report On U.S. Antidumping And Countervailing Duties Against China Upholds Many Of The Panel's Legal Findings But Reverses On Two Key Issues

The World Trade Organization Appellate Body (“AB”) issued its report in *US - Definitive Anti-Dumping And Countervailing Duties On Certain Products From China*. This report resulted from the Government of China’s appeal of many of the lower level WTO Panel’s legal findings, which generally held that U.S. actions in four antidumping (“AD”) and countervailing duty (“CVD”) investigations were consistent with the World Trade Organization (“WTO”). In its findings, the AB reversed two key conclusions reached by the Panel. United States Trade Representative Ron Kirk (“USTR Kirk”) referred to the decision as “overreaching by the Appellate Body.”

China appealed four issues from the Panel report, including certain specificity determinations, the calculation of benefit using certain benchmarks, the determination that over 50 percent government ownership is sufficient to find an entity to be a “public body,” and the determination that the concurrent application of countervailing and antidumping duties calculated under the non-market economy (“NME”) methodology is permissible. The AB found that United States’ specificity and benchmark determinations were consistent with the WTO Subsidies and Countervailing Measures Agreement. The AB also determined that the WTO agreements do not prohibit the concurrent application of CVD and AD duties calculated using the NME methodology.

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In This Issue

- 01 WTO Appellate Body Report On U.S. Antidumping And Countervailing Duties Against China Upholds Many Of The Panel’s Legal Findings But Reverses On Two Key Issues
- 02 President Obama Visits Brazil, Seeks Closer Trading Relationship
- 03 China’s 12th Five-Year Plan For National Economic And Social Development Provides A Glimpse Of China’s Industrial Focus In The Near Term
- 04 USTR’s 2011 Trade Policy Agenda Targets Job Growth
- 04 U.S. Importers Face Jail Time And Massive Fines For Illegally Avoiding Antidumping Duties
- 05 Commerce’s New Rule On Remedial Tariffs Can Affect Corporate Acquisitions
- 06 News of Note
- 08 Contacts

The AB reversed the Panel on two key issues. First, the AB held that the United States violated its WTO obligations by finding that certain state-owned enterprises were “public bodies” capable of conferring subsidies because the U.S. Department of Commerce (“Commerce”) had failed to determine that these enterprises, despite being majority-owned by the Chinese government, were indeed being directed by the government, or

otherwise carrying out government functions. Second, the United States violated its WTO obligations by applying CVDs concurrently with AD duties based on the NME methodology without assessing whether any adjustments were needed to avoid double counting.

The AB report and Panel report, as amended by the AB report, were adopted by the WTO's Dispute Settlement Body ("DSB") on March 25. The United States must now advise the DSB before April 25 of its intentions with respect to implementation of the reports.

If the United States decides to implement the adverse rulings in this case, it is expected to do so under Section 123 and/or Section 129 of the Uruguay Round Agreements Act. Action under Section 123 would require Commerce to amend its AD NME and/or CVD regulations or practice to conform to the adverse WTO findings. Action under Section 129 would result in the issuance of redeterminations by Commerce in the four AD and CVD proceedings at issue. In addition, a statutory change in AD/CVD laws may be needed to enable Commerce to make any required downward adjustments in the AD or CVD orders at issue.

The United States will undoubtedly request a reasonable period of time ("RPT") to implement the adverse findings of the AB. Based on past experience, it is expected that the RPT likely will range somewhere between 11 months and 15 months from March 25, the date the reports were adopted. Certain companies and groups, including the Committee to Support U.S. Trade Laws, have called on the U.S. government not to implement the AB decision because of their view that it goes beyond the WTO Agreements.

President Obama Visits Brazil, Seeks Closer Trading Relationship

President Obama, along with several prominent administration officials, visited Brazil from March 19-20 as part of his first trip to Latin America since taking office. He and his delegation later visited Chile and El Salvador. President Obama met with Brazilian President Dilma Rousseff and a number of Brazilian and U.S. business leaders. In his meetings, President Obama emphasized that the American people recognize and support Brazil's recent successes, including the strong growth in Brazil's economy. He told business leaders that, as part of his jobs strategy, the United States was interested in increasing its exports of goods and services to Brazil's 200 million consumers.

During the trip, officials from the two governments signed a number of significant agreements, including a Trade and Economic Cooperation Agreement ("TECA"), which creates a commission to address bilateral trade and economic issues. President Obama stated that TECA is intended to "foster greater dialogue about how we can break down the barriers that still exist between our two nations." USTR Kirk, who will be the U.S. co-chairman of the bilateral commission, will meet at least once a year with his Brazilian counterparts. USTR Kirk stated that Brazil has been a "fairly constrained" market for the United States in the past, but that TECA and an ongoing dialogue could help "really open the doors." USTR Kirk also tied TECA to President Obama's goal of doubling exports between 2010 and 2015, stating that it could be "hugely accretive" in meeting that goal.

Secretary of Commerce Gary Locke, who met with American and Brazilian CEOs during the trip, reported that those CEOs would like to see a free trade agreement between the two countries. Secretary Locke stated that a free trade agreement takes a long time to negotiate, but that TECA is a good first step. Secretary Locke emphasized that

U.S. exports to Brazil exceeded \$50 billion in 2010 and are growing twice as fast as U.S. exports to the rest of the world. Secretary Locke also expressed hope that U.S. companies will be centrally involved in infrastructure projects in Brazil in the near future, including major projects in preparation for the 2014 World Cup and the 2016 Olympics.

Other highlights of the trip included the Agreement on Air Transportation and an associated Memorandum of Consultations on Air Transportation that were signed by President Obama and President Dilma Rousseff. The two countries' leaders also expressed their expectation that the Agreement on Maritime Transport and the Tax Information Exchange Agreement will enter into force in the near future.

Importantly, converging interests in energy-related matters, including in oil, natural gas, biofuels and other renewables received great attention, and the visit created new opportunities for both American and Brazilian businesses. A Working Group on Energy was created, and a Memorandum of Understanding to Advance the Cooperation on Biofuels was signed.

China's 12th Five-Year Plan for National Economic And Social Development Provides A Glimpse Of China's Industrial Focus In The Near Term

China's much anticipated 12th Five-Year Plan for National Economic and Social Development ("the Plan") was approved by the People's Congress on March 14. The Plan has important implications for industries around the world, because it highlights the Chinese government's areas of focus for the next five years. The Plan sets as a goal seven percent annual growth for the Chinese economy and establishes industrial goals and identifies key growth industries for the period of 2011 to 2015. The Chinese government intends to promote manufacturing industries, especially nine key

industries: equipment manufacturing; shipbuilding; automobiles; iron and steel; non-ferrous metals; building materials; petroleum and chemicals; light industry; and textiles.

The Plan also continues to emphasize the importance of the seven strategic industries: energy-efficiency and environmental protection; new-generation information technology; biology; high-end equipment manufacturing; renewable energy; new materials; and new-energy cars. The Plan aims to improve Chinese companies' competitiveness in the world market.

Local governments are expected to formulate derivative plans and policies for their own jurisdictions and industries to achieve the goals and tasks specified by central authorities in the Plan. For example, the Shanghai Municipality already has established a 10 billion RMB fund to support the industrialization and development of high-tech industries in its jurisdiction from 2011 to 2015. Guangdong Province similarly is planning to allocate 2 billion RMB each year, amounting to 10 billion RMB in total, to support the development of strategic industries, as well as other subsidy programs. Hebei Province has set an annual goal of 8.5 percent for its GDP growth, has called for reforming and upgrading manufacturing industries, including the iron and steel industry and the petrochemical industry, and improving the seven strategic industries, and further encourages exploring the world market and increasing the total trade value of the province to \$70 billion by 2015.

The Chinese government's promotion of the nine key manufacturing industries and the seven strategic industries will affect U.S. companies competing in these industries. Commerce has found that key industries and projects identified in previous Five-Year Plans receive significant subsidies from both the central government and local governments in various forms, including loans, grants, tax incentives, and low-priced inputs. Companies active

in the industries identified for special treatment by Chinese central planning should be aware that the Plan may result in increased subsidization by the Chinese government in these areas, affecting trade flows and product competitiveness.

USTR's 2011 Trade Policy Agenda Targets Job Growth

The Office of the United States Trade Representative ("USTR") has released President Obama's 2011 Trade Policy Agenda ("Agenda") – an annual publication of the Administration's trade policy priorities in the coming year. The Agenda, released in March, names the following priorities for 2011.

Enhance American Economic Growth and Employment. The Agenda highlights various areas of focus for 2011 aimed to increase U.S. employment and trade opportunities, including the U.S.-Korea Free Trade Agreement ("KORUS"), the Trans-Pacific Partnership, participation in the Asia-Pacific Economic Cooperation Forum, the WTO Doha Round negotiations, and Russia's accession into the WTO.

Enforce America's Rights and Protect Innovation in a Strong, Rules-Based Trading System. The Agenda discusses goals related to enforcing U.S. rights and benefits under existing international trade agreements, including continuing active participation in the WTO and regional trade agreement dispute settlement systems; emphasizing environmental and labor issues in negotiations with trading partners; ensuring compliance with international scientific guidelines; and protecting U.S. innovation through enforcement of intellectual property rights.

Strengthen Trade Relationships with Global Partners. The Agenda describes U.S. efforts in all regions of the world to deepen existing trade relationships and also focuses on new key markets

in which to expand trade relationships through formal trade agreements and other mechanisms.

Partner with Poor and Developing Countries on Trade and Development Issues. The Agenda discusses goals for 2011 to promote policies that utilize international trade as a component of development policy. Specifically, the Agenda calls for cooperation with Congress in securing re-authorization of the General System of Preferences and the Andean Trade Preference Act, continued commitment to provide duty-free and quota-free market access to least developed countries, continued support for trade programs benefiting countries affected by natural disaster, and general support for creating public-private partnerships on the issue of trade and development.

Reflect and Uphold American Values in Trade Policy. Finally, the Agenda reaffirms President Obama's commitment to ensuring that American values are respected and incorporated into the nation's trade policies. This includes assigning high priority to labor and environmental protections, continuing and expanding transparency and public engagement in negotiations and trade policy generally, and securing long-term approval for the Trade Adjustment Assistance program.

U.S. Importers Face Jail Time And Massive Fines For Illegally Avoiding Antidumping Duties

U.S. Customs and Border Protection ("U.S. Customs") and the Department of Justice have stepped up prosecution of fraud committed to avoid the payment of antidumping duties. In March 2011, the Department of Justice indicted the owner of a Baltimore-based importer for allegedly making false claims on entry documents. Multi-million dollar forfeitures and fines are possible. In late 2010, owners of a Chicago-area importer accepted a plea agreement that included imprisonment, a six-figure forfeiture, and confiscation of goods. The

defendants submitted false invoices to avoid cash deposits and obstructed U.S. Customs' investigation. Also in late 2010, U.S. Customs seized goods valued at nearly \$500,000 after discovering that the entries violated antidumping duty laws. After the Baltimore indictment, Baltimore Port Director Ricardo Scheller stated, "These charges acknowledge the serious impact dumping has on competitiveness of American industry and our nation's economic vitality. CBP [U.S. Customs] is committed to working closely with ICE [Immigration and Customs Enforcement] and the U.S. Attorney's Office to bring future antidumping violators to justice."

Criminal investigations concerning the failure to pay antidumping duties generally focus on the importer's submission of false entry documents and commercial invoices, and the making of false claims concerning the quantity, value, physical description, and/or country of origin of goods. The maximum statutory penalties include five years imprisonment and fines of \$250,000, or twice the resulting gross gain or loss, whichever is greater. Additional prison time and fines can arise where related crimes are prosecuted.

In the Baltimore indictment, Jin Qing Huang, owner of Woncify, Inc. ("Woncify"), was arrested for defrauding U.S. Customs and failing to pay antidumping duties on imported goods. Huang and Woncify were indicted for conspiracy, smuggling, making false statements, and false classification of goods. They allegedly conspired to avoid payment of \$1,150,000 in antidumping duties. Huang was held pending a detention hearing. The indictment seeks forfeiture of lost duties plus a maximum fine of \$250,000 per count. Huang also faces sentences of five years for conspiracy, 20 years each on three smuggling counts, and two years each on six false entries/false classifications counts.

The Chicago plea agreement involved owners of S&P Plastics, Inc. Executives Young Seung Shin

and Peili Ding tendered false invoices and falsely declared entries were not subject to an antidumping duty order in order to avoid payment of cash deposits. They also obstructed justice by destroying records and tendering altered records. Shin and Ding received prison terms, must forfeit \$182,871 for lost duties, and goods were seized.

Finally, after discovering a scheme to circumvent an antidumping duty order on bags from China, in late December 2010 U.S. Customs agents in Los Angeles seized goods with an estimated U.S. value near \$500,000. The importer used false invoices to conceal the goods.

Commerce's New Rule On Remedial Tariffs Can Affect Corporate Acquisitions

Companies that are thinking about acquiring a foreign company that exports to the United States should determine what effect the acquisition may have on remedial duties owed on products exported to the United States. Prior to an acquisition, a company may have no outstanding remedial tariff liabilities. However, the target company could become subject to these duties after acquisition.

A company that exports products subject to an AD or CVD order can receive a low or "*de minimis*" tariff rate (*i.e.*, a duty rate below 0.5 percent established in an annual review process). Under U.S. law, companies with *de minimis* rates are not required to pay these duties to U.S. Customs. When a company's ownership changes, however, the newly acquired company does not automatically receive the same tariff rate as the pre-sale company.

To receive the pre-sale company's rate, the new company files a request with Commerce in a process known as a "changed circumstances review" ("CCR"). If Commerce determines that the new company is not the "successor-in-interest" to the pre-sale company, then the new company receives the "all-others rate." This rate, applicable

to companies without individually established rates, is likely to be much higher than the pre-sale company's rate.

For years, Commerce applied the same standard to both AD and CVD CCRs. According to that standard, the new company receives the pre-sale company's rate if the "totality of circumstances" demonstrates that the new and presale companies operate as "the same business entity." Commerce, applying its traditional standard, considers how changes in management, production facilities, supplier relationships, and customer base, affect the company's pricing behavior. This standard remains in effect for AD CCRs.

After lengthy consideration, Commerce has applied a new standard to CVD CCRs, which the Court of International Trade recently upheld in *Marsan Gida Sanayi Ve Ticaret A.S. v. United States*. Under this standard, the new company receives the pre-sale company's rate if there is no evidence of significant changes that could affect the nature and extent of the new company's subsidy levels. Commerce considers the following non-exhaustive factors significant: (1) changes in ownership, other than normal trading of publicly owned, broadly held stock; (2) corporate mergers and acquisitions; and (3) purchases or sales of significant productive facilities. Commerce focuses only on whether these changes occur, not on whether they actually affect subsidy amounts.

News of Note

China Set To Impose Tax On Rare Earth Minerals

China's Ministry of Finance and the State Administration of Taxation has issued a statement addressing its intention to impose a tax on rare earth minerals beginning on April 1. A tax of 60 RMB (approximately \$9.10) per ton will be set for light rare earths, and a tax of 30 RMB (approximately \$4.55) per ton will be set for medium and heavy rare earths. The tax will increase annual production costs for Chinese producers of rare earth minerals. Prices for rare earth minerals have soared in recent months due to a supply shortage resulting from the hoarding of these materials. The Chinese government will use the tax to support research on rare-earth processing and set up environmental compensation funds or to build rare earth reserves.

China Requests Consultations On Zeroing; Commerce Receives Voluminous Comments On Its Previously Proposed Rule Change

The Government of China filed a request for consultations at the WTO on the United States' zeroing practice. In its March 2 filing, China alleges that Commerce's "zeroing" practice is inconsistent with the obligations of the United States under the Anti-Dumping Agreement. *See*, http://www.wto.org/english/news_e/news11_e/ds422rfc_28feb11_e.htm.

Other countries already have successfully disputed Commerce's zeroing practice in challenges brought to the WTO. As a result of those disputes, in December 2010, Commerce proposed modifications to its calculation methodologies that would end the use of zeroing in annual reviews in antidumping cases. When the comment period closed on February 18, over fifty letters had been filed in response to Commerce's request. The responding parties included nine foreign governments, 23

members of Congress, and representatives from many U.S. and foreign industries.

For a brief discussion of Commerce's December request for comments, see the February 2011 edition of the *Trade & Manufacturing Alert*. See, <http://www.kslaw.com/library/newsletters/TradeManufacturingAlert/2011/February/index.html>.

The Government Of India's 2011-2012 Annual Budget Means Opportunities For Importers

The Government of India has released its annual budget, which included specific tariff reductions on sensitive items. According to the February 28 document, the basic customs duty on raw silk was reduced from 30 percent to five percent; stainless steel scrap is now exempt from the customs duty; and the cement industry will now benefit from a reduction in duty on two raw materials: petcoke and gypsum, which duties were reduced to two and one-half percent. In an effort to maintain its domestic steel supply, the Government of India increased an export duty for all types of iron-ore to 20 percent. The Government of India also announced its plans to release a national manufacturing policy in the near future.

Administration Trade Policy Personnel Update

On March 9, President Obama nominated Commerce Secretary Gary Locke to be Ambassador to China. Secretary Locke has extensive experience in trade, both as Commerce Secretary and previously as Governor of the State of Washington. In addition, on March 4, the President nominated Paul Piquado to be Commerce Assistant Secretary for Import Administration. Piquado currently is the Commerce Department Deputy Assistant Secretary for Antidumping and Countervailing Duty Policy and Negotiations.

Upcoming personnel changes can be expected at the International Trade Commission, where three

Commissioners will have completed their appointed terms by mid-June 2011. Due to the bipartisan makeup of the Commission, the positions will be filled by Republicans. These openings create an opportunity to add Commissioners with expertise in trade issues affecting U.S. manufacturers.

Obama Administration Releases Recommendations To Congress On Intellectual Property Enforcement At The Border

On March 15, the U.S. Intellectual Property Enforcement Coordinator ("IPEC") issued a white paper on recommended legislative changes designed to increase the effectiveness of U.S. enforcement efforts. Among other things, the Administration aims to clamp down on infringing imports. IPEC recommends legislative authorization for U.S. Customs to share information and product samples with rightsholders in order to receive help in identifying infringing merchandise at the borders. This would resolve the problem of U.S. Customs currently lacking express authority to notify rightsholders when infringing products have been excluded or seized under an International Trade Commission order. IPEC also recommended a procedure for voluntary disclosure without penalty for importers who unknowingly imported infringing products. In addition, IPEC recommended authorizing penalties on exporters (as opposed to just importers) and on companies that are found to have been involved in the importation of infringing products during post-entry audits.

USTR Kirk Testifies Before The Senate Finance Committee; KORUS Ready For Congressional Approval, But U.S.-Columbia and U.S.-Panama FTAs Need Work

USTR Kirk testified before the U.S. Senate Committee on Finance on March 9. During his testimony, USTR Kirk stated that USTR was prepared to draft implementing legislation for KORUS, but that the U.S.-Columbia and U.S.-

Trade & Manufacturing Alert

Panama Free Trade Agreements (“FTAs”) still needed further work. Several senators, including Senator Max Baucus of Montana and Senator Orrin Hatch of Utah, pressed USTR Kirk to have the Obama Administration send all three FTAs to Congress immediately for approval, but USTR Kirk testified that there were core labor and environmental issues that remained to be resolved

in the U.S.-Columbia and U.S.-Panama FTAs and the Obama Administration would not compromise on those issues. USTR Kirk also testified that although China has made improvements in complying with its trade commitments, the United States must remain vigilant on China.

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