CASE COMMENT: US - SHRIMP AND SAWBLADES (CHINA)

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INTRODUCTION

Despite many legal rulings to clarify the WTO inconsistency of zeroing practices, in practically all aspects of anti-dumping proceedings, the United States declined to categorically rectify the illegal antidumping duties based on zeroing calculation methods. This dispute is merely example of a number of disputes where the US government had to exhaust the whole process for proper implementation of the WTO rulings under its domestic legal system. The US approach is starkly contrasted with the position taken by the European Union that categorically terminates zeroing practices pursuant to the WTO rulings. While the WTO system indeed recognizes individual Member's peculiar regulatory systems and policies during implementation phases, the current situation in which WTO Members must individually resort to the dispute settlement system in order to rectify the US zeroing practices raises a serious concern regarding the legitimacy and integrity of the WTO dispute settlement system. Maybe it is time for WTO Members to agree on better implementation mechanisms before more Members try to develop overly burdensome and complicated regulatory processes for compliance.

FACTS

China filed two separate requests for consultations under article 4 of DSU (Consultation) complaining about the United States' 'zeroing in' practice to determine anti-dumping duties which is inconsistent with the WTO Obligations (violation of article 6 of GATT);

28 February 2011: consultation request by China with respect to anti-dumping measures of certain frozen warm water shrimps;

22 July 2011: Consultation request by China with respect to anti-dumping measures of diamond saw blades. The United States was not happy with the complaint by China because US had already begun to end the practice of zeroing in;

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13 October 2011: China requested for the establishment of panel and also, China and the United States agreed on the procedures;

25 October 2011: The Panel was established according to Article 6 of DSU to discuss the issues raised upon by China upon UNDOC that UNDOC acted inconsistently with Article 2.4.2[1] of the Anti-Dumping Agreement by using zeroing in the calculation of dumping margins;

21 December 2011: The panel was officially composed;

08 June 2012: The report of the panel was circulated.

DECISION

The two complaints which china challenged against the US were;

1. UNDOC's use of "zeroing in" methodology in calculation of certain anti-dumping margins against the WTO obligations.
2. UNDOC's reliance upon the same dumping margins calculation with zeroing to establish the separate rates.

Based on the previous rulings on zeroing practices by the Appellate Body, China brought these disputes to the WTO dispute settlement system in order to rectify the existing anti-dumping.[2] The panel request made on 13 October 2011 led to the panel report which was adopted on 23 July 2012. The European Union, Honduras, Japan, Korea, Thailand, and Vietnam joined as third parties in the panel proceeding. In the anti-dumping investigation for shrimp, the US petitioners challenged exporters not only from China but also from Brazil, Ecuador, India, Thailand, and Vietnam. The dumping margins for Chinese exporters, however, were very high compared to those for other countries. When China brought this

[1] 2.4.2 Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison.

[2] The consultation request was submitted to the WTO DSB on 28 February 2011. WT/DS422/1 (dated 2 March 2011)

case to the WTO, the United States did not oppose China's arguments that the methodology applied in the anti-dumping investigations was ***'substantially identical in all legally relevant respects'*** to the methodology employed in United States – Final Dumping Determination on Softwood Lumber from Canada[3]. In fact, the panel explained that this case presented a similar situation with a few previous disputes such as US–Shrimp (Ecuador)[4] and, subsequently, US-Shrimp (Thailand)[5], US-Anti-Dumping Measures on PET Bags[6], and US–Zeroing (Korea)[7].

Given that the United States did not rebut the arguments and the evidence submitted by China, the panel found that the United States acted inconsistently with Article 2.4.2[8] of the Anti-Dumping Agreement[i] due to the USDOC's use of zeroing in the calculation of the dumping margins for Allied, Yelin, and Red Garden in the shrimp investigation, and of the dumping margin for AT&M in the diamond saw-blades investigation. In addition, the panel ruled that the calculation of the separate rate on the basis of these margins necessarily incorporated the WTO-inconsistent zeroing methodology.

ROAD MAP & ANALYSIS

This comment will presents the case in the context of all WTO zeroing disputes with respect to the United States anti-dumping policies.

Considering many previous zeroing disputes in the GATT/WTO system, this dispute does not make any additional legal contribution to the relevant jurisprudence.[9] And yet, this case highlights the systemic problems of the WTO dispute settlement system in terms of implementation. Broadly speaking, zeroing disputes may be categorized into two groups:

- one group for setting forth important legal principles concerning zeroing practices, 'principal cases' and

[3] DS264
[4] DS335
[5] DS343
[6] DS383
[7] DS402
[8] *Supra* note 2
[9] Regarding the concise overview of the zeroing jurisprudence, see Cho, Sungjoon (2012), *No More Zeroing?: The United States Changes its Antidumping Policy to Comply with the WTO*, ASIL Insights, 16(8) and Vermulst, Edwin and Daniel Ikenson (2007), *Zeroing under the WTO Anti-dumping Agreement: Where Do We Stand?*, Global Trade and Customs Journal, 2(6): 231-242.

- The other group for rectifying the existing illegal anti-dumping duties based on rulings of principal cases, 'remedial cases'.

Also, four panel decisions directly attempted to reverse the Appellate Body rulings.[10] Moreover, predominant numbers of the WTO jurists, i.e., panelists and Appellate Body members, manifested the disagreement to the Appellate Body rulings. Despite all these controversies, the WTO dispute settlement system has repeatedly confirmed the *illegality of zeroing practices in almost all aspects of the anti-dumping investigations*.

Notwithstanding a host of the Appellate Body rulings, the fact that there are many subsequent 'remedial' disputes manifested structural problems in relation to the implementation of the WTO dispute settlement adjudications. Unlike other WTO Members that readily modify or change administrative actions such as by imposing AD duties pursuant to the WTO recommendations, the United States has continued to maintain its regulatory procedures to incorporate the WTO rulings.

The United States has applied this regulatory procedure stringently by interpreting that the scope of the determination can be modified very narrowly. Thus, even after the panels and the Appellate Body ruled that the zeroing practices used in an anti-dumping investigation were not consistent with the WTO obligations, the implementation of the rulings was always confined to the specific anti-dumping investigation in respective disputes. This situation caused many other WTO Members to suffer from essentially the identical problems in the US anti-dumping actions and eventually led them to bring their own complaints to the WTO dispute settlement system, separately.

CONCLUSION

The World Trade Organization (WTO) cited the US for its 'zeroing' practices in a case brought by China against the United States on US antidumping tariffs. The US levied anti-dumping tariffs against Chinese warm water shrimp and diamond saw blades imports in the original antidumping investigation and in subsequent administrative reviews. In February

[10] These cases are *US – Laws, Regulations and Methodology for Calculating Dumping Margins* (DS294), *US – Final Dumping Determination on Softwood Lumber from Canada (Art. 21.5)* (DS264), *US – Measures Relating to Zeroing and Sunset Reviews* (DS322), and *US – Final Anti-dumping Measures on Stainless Steel from Mexico* (DS344). Regarding legal disagreement between panels and the Appellate Body Members, see M. Lewis, 'Dissent as Dialectic: Horizontal and Vertical Disagreement in WTO Dispute Settlement', 48 *Stanford Journal of International Law* 1 (2012)

2011, China requested consultations with the US in the latest case, and a panel was established in October 2011. The European Union, Honduras, Japan, Korea, Thailand, and Vietnam participated as third-parties in the case. In its report, the WTO panel found the US Department of Commerce's use of zeroing methodology in calculating US anti-dumping duties in three investigations was inconsistent with its obligations in the WTO Anti-Dumping Agreement. After the report of the panel, if no appeal is filed within 60 days, the Dispute Settlement Body will have to adopt the report. And hence, on 23rd July 2012, the panel report was accepted by DSB. The United States did not contest China's assertions nor was their request that the United States cease the practice the zeroing one of their ways of battling the predatory practice of dumping (until they got caught) easier to admit wrongdoing than to fight it. In practice, the US uses 'zeroing' to cancel out any sale where dumping does not occur, which result in a higher final anti-dumping margin. The United States use of 'zeroing' has been the subject of several antidumping cases.