



ANTI-DUMPING: RECENT (AND NOT-SO- RECENT) DEVELOPMENTS IN WTO JURISPRUDENCE

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Targeted dumping

- Decision: AB Report, *US – Washers from Korea* (DS464)
- Issue: When and how should the weighted average to individual (third) methodology in Article 2.4.2 for addressing “targeted dumping” be applied?
- Outcome: 1) The IA identifies a pattern limited to transactions with significantly *lower* prices; 2) Within the pattern, amount of dumping is determined by comparing individual export transactions to the weighted average normal value *without zeroing*; 3) the overall margin is calculated by dividing the amount of *in respect of pattern transactions only* by the total value of all export sales, whether pattern or not.
- Implications: Zeroing is prohibited under the third methodology, but “negative margins” for non-pattern transactions nevertheless are effectively disregarded.

Individual treatment

- Decision: AB Report, *EC-Fasteners* (DS397) and Panel Report, *US-Shrimp* (Viet Nam)
- Issues: Individual, all others and state entity rates in AD investigations against NMEs
- Outcome: Pursuant to Art.6.10 and 9.2 the IAs have to determine individual dumping margins for each known exporter or producer from NMEs.
- Implications: The singularity of the exporters and producers from NMEs has to be determined by the IAs on the basis of facts and evidence submitted during the investigation.

Termination in Case of *Zero/De Minimis Margins*

- Case: AB Report, *Mexico-(Where's the) Beef (DS295)*, paras.
- Issue: Can an AD measure be applied in respect of an exporter/producer found in the investigation to have a zero or *de minimis* margin?
- Outcome: No. An investigation must be terminated *in respect of* an exporter/producer in these circumstances.
- Implications: Since the exporter/producer must be excluded from the measure (not just subject to a zero duty), if it starts dumping later you must start a new full investigation, you cannot open a review.

Disclosure

- Decisions: AB Reports, *China-GOES* (DS414), *China-SSST* (DS454,460)
- Issue: What information must an authority disclose under Art. 6.9 ADA?
- Outcome: An authority must disclose, *inter alia*, the home and export sales being used, the adjustments made, and the calculation methodology applied.
- Implications: While the authority needn't "disclose a spread sheet duly completed", the AB has noted that full disclosure is necessary, *inter alia*, to identify whether the determination includes "mathematical errors", which suggests the party must be able to reconstruct the calculation based upon the information provided.

Information gathering & verification

- Decision: *China – HP SSST* (DS454/460)
- Issue: Can the IA reject information submitted during the verification on the sole basis that it was not provided prior to the verification?
- Outcome: No. The IA must balance the due process interests of the parties with the need to control and expedite the investigation.
- Implications: When deciding, the IA should consider other factors *inter alia* the timing of the new information; whether it causes undue difficulties; whether it is voluminous just mere arithmetical or clerical corrections; whether it relates to facts that are essential within the meaning of Article 6.9; and whether the information was specifically requested by the IA.

Confidential info: Good cause

- Decisions: *China – HP SSST (DS454/460), EC–Fasteners (DS397)*
- Issue: Must an authority provide an “explanation” regarding its assessment of good cause?
- Outcome: A party seeking confidential treatment must make a good cause showing, and good cause must “be assessed and determined objectively” by the authority. A panel must examine the issue on the basis of the published report & supporting documents. Mere summarization of the party’s assertions does not demonstrate that the authority had objectively assessed good cause.
- Note: Issue will be examined in depth at the next WGI.

Definition of domestic industry

- Decision: AB Report, *EC-Fasteners* (DS397).
- Issues: What constitutes a “major proportion” of the total domestic production? Can the IA exclude non-supporting or non-cooperating producers from domestic industry definition?
- Outcomes: 1) There is no magical numerical threshold, but the lower the share of total domestic product, the more likely that selection will imply a “material risk of distortion”. Including only those willing to be included in the sample involves “self selection” which risks such distortion.
- Implications: If choosing to select a subset of domestic producers as the domestic producers, you must be careful to ensure they are not unrepresentative of domestic production as a whole.

Cumulation

- Decision: AB Report, *US-CVD on Carbon Steel Flat Products from India* (DS436), paras. 4.563-4.729.
- Issue: When conducting parallel AD and CVD investigations, can injury caused by dumped imports be cumulated with that caused by subsidized imports ?
- Outcome: No. The effects of dumped but unsubsidized imports cannot be cumulated with the effects of subsidized but undumped imports.
- Remark: This case dealt with a claim regarding CV measures under Article 15.3 of the SCM, but the logic presumably applies also in AD cases under Article 3.3 ADA.
- Implications: Dumped imports must be treated as an “other factor” in non-attribution analysis in a CVD case (and vice-versa).

PARTIAL FACTS AVAILABLE

- Case: *US – Steel Plate (India)*(DS206)
- Issue: Can an IA rejected all export price information because of problems with home market price data?
- Outcome: No. The determination whether to resort to facts available must be made with respect for specific data. If that data is verifiable, timely and can be used w/o undue difficulty, it must be used.
- Implications: Blanket rejection of all information because some is missing or rejected is not permissible. Rather, an IA must examine the extent to the missing data might render unusable other data (e.g., lack of cost data might invalidate home market prices) must be determined case-by-case.

Facts Available: “all others” rate

- Decision: Panel Reports, *China – HP SSST* (DS454/460) and *China-Broilers* (DS427)
- Issue: Can you use facts available for “all others” rate?
- Outcome: Yes, so long as the IA informs exporters about the information required, and indicates that FA will be used if they fail to provide that information so that unknown exporters are on notice of what information is required and what the consequences may be.
- Implications: The IA has to satisfy specify in detail what information is expected from the producers/exporters, including those not known to the IA.
- Query: How does such notice help producers that are not exporting at the time of the investigation but want to export later?

Costs associated with production and sale

- Case: *Panel Report, EU-Biodiesel (Argentina)*(DS473)
- Issue: In constructing normal value, Can an IA disregard input prices as identified in the producer's records on the grounds they are "artificially low" due to government action?
- Outcome: No. Under ADA Art. 2.2.1.1, whether the costs as shown in the producer's records "reasonably reflect the costs associated with product and sale" relates to the producer's actual costs.
- Implications: An IA cannot disregard input costs on the grounds they are distorted by government intervention.
- N.B. – Issue is on appeal, and a ruling is expected on Thursday!