KING & SPALDING

Remedies for remedies 2017

May 3, 2018

PREPARED FOR:

11th ANNUAL UPDATE ON WTO DISPUTE SETTLEMENT

PRESENTED BY:

Rambod Behboodi
Partner
King & Spalding, Geneva

Anti-dumping technicalities

Article 2 – Determination of dumping

US – OCTG from Korea

- Article 2.2 sets out non-hierarchical alternatives to home market sales prices for normal value determination; authority free to choose which: may impose a minimum quantitative threshold (say, 5%) as a condition for use of third-country sales to determine normal value.
- Article 2.2.2 does not permit an authority to exclude data pertaining to low-volume sales when determining the amounts for SG&A and profits.
    - "This is, in terms of overall coherence of Article 2, somewhat perplexing. But this does not allow an interpretation that does not fully comport with the express language of Article 2.2.2."
    - Rejected two other arguments as *ex post rationalization*.
- The term "same general category of products" in Article 2.2.2(i) or (iii) must be understood to be **broader**, not narrower, than that of the like product defined by the investigating authority.
-

Anti-dumping technicalities

Article 2 – Determination of dumping

US – OCTG from Korea (cont.)

- The mandatory nature of the obligation to determine and apply a profit cap flows from the use of the imperative **"shall not"** in Article 2.2.2(iii).
  - Why is it that all "shall"s create obligations, while all "should"s are not hortatory?
- "We exercise judicial economy with respect to Korea's Article 2.4 claim."
  - What about the *China – Broilers* problem? US corrects Article 2.2 problems – then lands in an Article 2.4 problem in a 21.5 process?
  - Tension between judicial economy, final resolution, and due process.
- Interaction between domestic recourse and WTO dispute settlement.
  - The references in Korea's panel request, including "[a]ny related measure" or "other segments of the proceeding", do not permit it to challenge court-ordered **remand** determination, because that determination changes the essence of the final determination expressly identified in Korea's panel request.

Anti-dumping technicalities

Article 2 – Determination of dumping

US – OCTG from Korea (cont.)

- The term “it appears to the authorities” in Article 2.3 denotes a situation in which, because of the association at issue, the investigating authority **perceives** the export price not to be trustworthy. **[Article XXI parallel?]**
    - An investigating authority is always obliged to establish facts properly and evaluate them in an unbiased and objective manner.
    - An investigating authority could not simply ignore evidence before it suggesting that the export price is reliable notwithstanding association.
    - No requirement to make a “determination” as to the reliability of the export price.

Anti-dumping technicalities

Article 2 – Determination of dumping

EU – Fatty alcohols (AB)

- Article 2.4 requires investigating authorities to ensure a fair comparison between the export price and the normal value and, to this end, to make **due** allowance, or adjustments, for differences affecting price comparability.
    - For a comparison to be fair, it must be unbiased, objective, and even-handed.
    - The third sentence of Article 2.4 refers to differences in characteristics of the compared transactions that have an impact, or are likely to have an impact, on the prices of the transactions.
    - "As the Appellate Body has explained"
    - "The Appellate Body has emphasized"
    - "As the Appellate Body has clarified"
- Not that the nature and degree of affiliation between related companies are **irrelevant** to whether any allowances should be made in order to ensure a fair comparison between the normal value and the export price; rather, 2.4 analysis is case specific.

Anti-dumping technicalities

Article 2 – Determination of dumping

EU – Fatty alcohols (AB)(cont.)

- A close relationship between two entities may result in the reported value of the expenses being different from the actual value.
- Investigating authorities would be justified in looking into this.
- **On the facts**, the AB upheld the panel's findings that:
  - the EU authorities were justified in undertaking such an inquiry; and
  - based on the evidence on the record, ICOF-S' SG&A and profit represented a reasonable basis for the EU authorities to calculate the actual value of the mark-up.

Anti-dumping technicalities

Article 2 – Determination of dumping

US – Certain Methodologies (China)

- At issue is the consistency, with Article 2.4.2 of USDOC's **application** in three cases of the *Nails* test in response to allegation of "targeted dumping":
  - "standard deviation test" to find a **pattern** of export prices that differed among different purchasers, regions or time periods; and
  - "price gap test" to establish whether differences identified are **significant**.
- The second sentence of Article 2.4.2:
  - 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.
- Function is to enable investigating authorities to identify "targeted dumping".

Anti-dumping technicalities

Article 2 – Determination of dumping

US – Certain Methodologies (China) (cont.)

- An investigating authority is required to identify a regular series of price variations relating to one or more particular purchasers, or one or more particular regions, or one or more particular time periods to find a pattern.
- If particular prices are observed to differ in respect of a particular purchaser, region or time period, those prices may be treated as a regular and intelligible form or sequence relating to that **purchaser**, region or time period.
- Just because the distribution of the export price data is not symmetrical, it does not mean that an investigating authority could not find that the export prices to the "target" differ significantly from the other export prices and form a pattern within the meaning of the second sentence of Article 2.4.2.

Anti-dumping technicalities

Article 2 – Determination of dumping

US – Certain Methodologies (China) (cont.)

- Article 2.4.2 requires finding **that** there is "significant" price difference, not **why**.
  - "Significant" has a **qualitative** dimension in addition to a quantitative one.
  - Purely larger numerical differences cannot, in all factual circumstances, lead to the conclusion that the identified differences in export prices forming the relevant pattern are "significant".
  - You look at objective market factors – the nature of the product, the industry, the market structure, or the intensity of competition – for qualitative significance.
- Investigating authorities are **not** required to examine the reasons for the relevant differences in export prices, or whether those differences are unconnected to targeted dumping.

Anti-dumping technicalities

Article 2 – Determination of dumping

US – Certain Methodologies (China) (cont.)

- An investigating authority may rely on prices of individual export transactions **or** average prices in order to find a pattern.
    - The reference to “prices of individual export transactions” in the first part of the second sentence does not limit how a pattern is to be identified in the second part of the second sentence.
- An investigating authority may establish margins of dumping by applying the W-T methodology **only** to “pattern transactions”.
    - May not combine comparison methodologies for pattern and non-pattern.
- “we declare moot”

Anti-dumping technicalities

Article 3 – Injury

China – Cellulose pulp

- "The legal framework for injury determination"
- Article 3 requires an investigating authority to **consider**, **examine**, and **evaluate** a broad range of factors, and to **demonstrate** that dumped imports are causing injury to the domestic industry.
- Article 3.1 requires that an injury determination be based on positive evidence and involve an "objective" examination …
    - These basic principles inform the more detailed provisions set out in the remainder of Article 3; no independent obligation that can be judged in the abstract, or in isolation and separately from the substantive requirements.
    - Why? "Positive evidence" must pertain to the particular substantive elements relevant to the determination made, and "objective examination" must relate to the consideration and evaluation of that evidence in the investigation at issue.

Anti-dumping technicalities

Article 3 – Injury

China – Cellulose pulp (cont.)

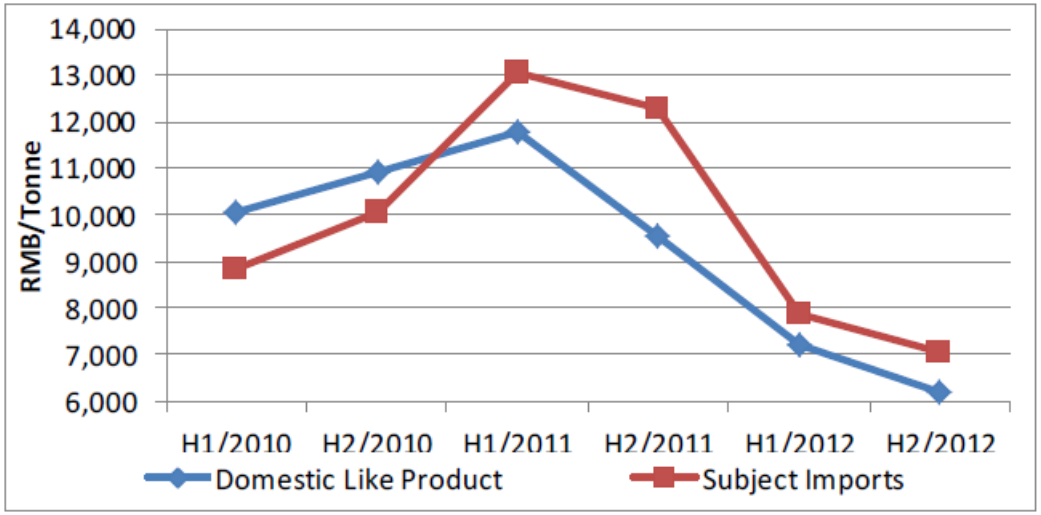
- You need to look at the analysis and the determination in the context of the obligations at issue in order to assess whether evidence was positive and assessment was objective.
  - Article 3.2 has detailed instructions to consider "the effect of the dumped imports on prices in the domestic market for like products" provided for in Article 3.1.
  - Article 3.4 elaborates on "the consequent impact of these imports on domestic producers of such products" provided for in Article 3.1.
- A "logical progression" from consideration of the various substantive elements set out in Articles 3.2, 3.4, and when the issue of threat of material injury is raised, Article 3.7, to demonstrating that dumped imports are causing material injury under Article 3.5.
  - No obligatory sequence for the analysis.

Anti-dumping technicalities

Article 3 – Injury

China – Cellulose pulp (cont.)

- Under Article 3.2, Canada alleges that MOFCOM's finding of parallel price trends is without support in the evidence on the record, contending that the price trends were not parallel because they crossed at the end of 2010. Panel disagreed.



Anti-dumping technicalities

Article 3 – Injury

China – Cellulose pulp (cont.)

- The fact of simultaneous declines in the prices of both dumped imports and the domestic like product does not necessarily mean that the domestic prices were pushed down by the declining prices of the dumped imports. **This needs to be explained.**
- Import prices were consistently higher after the cross-over. But, price depression is not contingent on the existence of price undercutting, and may be found in a situation where the prices of dumped imports is higher than the price of the domestic like product. **This needs to be explained.**

Anti-dumping technicalities

Article 3 – Injury

China – Cellulose pulp (cont.)

- The existence of price depression does not necessarily require that there be a concurrent decrease in the domestic industry's market share. Price depression can exist "in a situation where there is no increase, or even in some circumstances a decrease, in the volume or market share of dumped imports“. **This needs to be explained.**
- There is no requirement in Article 3.4 that all relevant factors, or even most or a majority of them, have to show negative developments in order to arrive at an understanding that dumped imports are having a negative impact on the domestic industry. But if there are positive developments … **This needs to be explained.**

Anti-dumping technicalities

Article 3 – Injury

US – Coated paper

- In a **threat of injury analysis**, Articles 3.5 and 15.5 set out no limits or guidelines as to the methodology for non-attribution analysis.
    - Indonesia proffers no basis in the text of these provisions or in prior decisions for its assertion that authorities are required, in certain situations, to rely on quantitative methods, economic constructs or models in their assessment of the injury caused by other factors..
- Depending on the record information before the investigating authority and the circumstances of the investigation at issue, possibly useful or desirable to undertake a quantitative assessment of the impact of other factors.
    - No requirement that it do so.
    - An adequately reasoned explanation of the qualitative effects of other factors based on the evidence before it will suffice.

Anti-dumping technicalities

Article 3 – Injury

US – Coated paper (cont.)

- In a **threat of injury analysis**, Article 3.7 and Article 15.7 do not require an investigating authority to have found negative price effects during the POI as a prerequisite for concluding that negative price effects will occur in the imminent future.
    - Essence of a threat determination that situation existing during the POI is predicted to change such that there will be injury in the imminent future, if measures are not imposed.
- Rejected Indonesia's interpretation of Articles 3.8 and 15.8: no discipline on Members' decision-making procedures in determining whether a domestic industry is threatened with injury and whether to apply measures.
    - The US **tie vote** provision is a procedural mechanism to establish an outcome based on the votes of individual Commissioners in the event of a tied vote on whether there is injury caused by subject imports.

SCM technicalities

Article 2 – Specificity

US – Coated paper

- Article 2: whether access to a **subsidy already found to exist** is limited to certain enterprises.
- No need for the authority to set out, in an Article 2 analysis, that the laws or regulations governing the subsidy programme **explicitly** provide for both elements of the subsidy.
    - This would not acknowledge the reality that governments provide subsidies under programmes that take many forms, some more explicit than others.
    - In many cases, it will not be evident on the face of the written instruments or acts of the granting authority whether the financial contribution at issue confers a benefit.

SCM technicalities

Article 2 – Specificity

US – Coated paper (cont.)

- A one-off subsidy to a company may be considered to be pursuant to a programme.
- A subsidy that is granted to a specific enterprise, either pursuant to a written instrument or by means of a single governmental action is, by definition, specific.
- In any event, it can in such cases certainly be concluded that the programme was used by a limited number of enterprises.
    - Indonesia's presentation of its case has evolved significantly during the course of the proceedings, which has made the Panel's task of assessing these claims all the more difficult.
    - Nonetheless, despite the fact that Indonesia's new allegations are not properly before us, we address these allegations in case they become relevant in the event of any implementation of the DSB rulings. (**Moot and of no effect?**)

SCM technicalities

Article 14(d) – In-country benchmark

US – Coated paper (cont.)

- Subsidy – Financial contribution - provision of goods – benefit – adequate remuneration:
  - "determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase".
- Primary benchmark is domestic arm's-length prices.
- **Not** appropriate to rely on private domestic prices where the government:
  - is the only supplier of the particular goods in the country;
  - predominant provider such that prices are distorted; or
  - administratively controls all the prices for those goods in the country.
- But mere fact that the government is a significant, or even the predominant supplier, of the relevant good cannot automatically lead to a finding of price distortion. No presumption and must be established in each case.

SCM technicalities

Article 14(d) – In-country benchmark

US – Coated paper (cont.)

- "According to Indonesia, the GOI does not sell, provide or supply "stumpage", or timber, to concession holders; rather, it only grants land-use concessions. USDOC should have solicited information to examine benchmarks relating to the per hectare cost of a lease for degraded forest land."
    - Indonesia has not made any claims under Article 1.1(a) of the SCM Agreement challenging the USDOC's determination that the GOI measure constituted a financial contribution in the form of provision of goods – standing timber.
- In a situation where, as in the present case, the government's market share is 93.73%, the government's position in the market approaches that of a sole supplier of the goods.
- Other features considered: the GOI administratively set the stumpage fees not based on market, ban on log exports, negligible log imports, and "aberrationally low" prices of log imports into Indonesia.

SCM technicalities

Article 14(d) – In-country benchmark

US – Coated paper (cont.)

- Log export ban and relevance of *Export restraints*:
  - *Export restraints* about entrustment and direction.
  - Here, log export ban used for determination of benchmark.

SCM technicalities

Article 12.7 – Facts available

US – Coated paper (cont.)

- No change in existing standard.
- **But**:
  - GOI provided factual evidence to the USDOC that stated that Orleans was unaffiliated with APP/SMG.
  - The USDOC reasonably considered that other factual evidence, submitted by the petitioners (World Bank Report, press reports and expert statement) raised doubts as to the accuracy and veracity of those documents.
  - USDOC requested additional information.
  - When information not forthcoming, “adverse inference.”

Procedural issues

Article 3 of the DSU

A case of *multiple articlosis*

EU – Fatty alcohols

- The European Union asked the AB to find that Indonesia's appeal is **inconsistent** with Article 3 of the DSU because it relates to an expired measure.
- The European Union argues that **almost all paragraphs of Article 3 of the DSU**, as well as WTO case law, support the proposition that an appeal is not **appropriate** when the measure at issue is withdrawn or has expired during the panel proceedings.
    - *If you look hard enough, you can see Versailles in that pile of bricks.*
- "These arguments reflect different permutations of the proposition that a dispute no longer exists after the withdrawal of the measure at issue. However, the **Appellate Body has expressly rejected** the proposition that the repeal of a measure necessarily constitutes, without more, a 'satisfactory settlement of the matter' …"
    - Er … and what about the **treaty provision** itself?