

**THE IMPORTANCE OF TRADE REMEDIES TO THE  
U.S. TRADE RELATIONSHIP WITH CHINA**

**CHALLENGES FACING THE USE OF ANTIDUMPING LAW:  
A CRITICAL PERIOD  
FOR THE ADMINISTRATION  
AND CONGRESSIONAL ACTION**

***AN UPDATE REPORT***

**TO THE U.S.-CHINA ECONOMIC AND SECURITY REVIEW COMMISSION**

**BY THE TRADE LAWYERS ADVISORY GROUP**

TERENCE P. STEWART, ESQ.  
ROBERT E. LIGHTHIZER, ESQ.  
DAVID A. HARTQUIST, ESQ.  
ROGER B. SCHAGRIN, ESQ.  
LINDA A. ANDROS, ESQ.

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# THE TRADE LAWYERS ADVISORY GROUP UPDATE

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The following report provides selected updates to issues reviewed in the May 2005 Report.

### OVERREACHING BY WTO DISPUTE SETTLEMENT BODIES

**Congress' Continuing Concerns.** Congress has, repeatedly, expressed its concern with a “pattern of decisions” by WTO panels or the Appellate Body “overreaching” by imposing obligations and restrictions on the use of trade remedies and with misapplication of the standard of review in WTO dispute settlement.

- Prior to Doha, House Concurrent Resolution 262 (2001) noted concerns about:
  - “the recent pattern of decisions by WTO dispute settlement panels and the WTO Appellate Body to impose obligations and restrictions on the use of antidumping and countervailing measures by WTO members under the Antidumping Agreement and the Agreement on Subsidies and Countervailing Measures;” and
  - “that WTO dispute settlement panels and the WTO Appellate Body {should} appropriately apply the standard of review contained in Article 17.6 of the Antidumping Agreement, to provide deference to a WTO member’s permissible interpretation of provisions of the Agreement, and to a WTO member’s evaluation of the facts where that evaluation is unbiased and objective and the establishment of the facts is proper;” and

Congress stated that at the Doha negotiations and any subsequent WTO round of negotiations, the U.S.:

“should preserve the ability of the United States to enforce rigorously its trade laws, including the anti-dumping and countervailing duty laws, and avoid agreements which lessen the effectiveness of domestic and international disciplines on unfair trade, especially dumping and subsidies, in order to ensure that United States workers, agricultural producers, and firms can compete fully on fair terms and enjoy the benefits of reciprocal trade concessions.”

- After the Doha Round was initiated, Congress expressed the same concerns in the Trade Act of 2002. *See* 19 U.S.C. § 3801(b)(3).

Congress, therefore, established negotiating objectives for the United States (1) to seek adherence to the applicable standard of review, and (2) to preserve the ability of the United States to enforce rigorously its trade laws.

**Administration Concerns.** Over the past ten years, the United States and many other WTO Members as well as legal commentators have criticized repeated instances of overreaching by WTO dispute settlement bodies. In its December 2002 report to Congress, the Executive Branch viewed “with concern the manner in which WTO panels and the Appellate Body have applied the applicable standard of review in disputes involving trade remedy and safeguard matters, and instances in which they have found obligations and restrictions on WTO Members ... that are not supported by the texts of the WTO Agreements” and pledged to address the problem in negotiations.

**Garfinkel-Dunn Letter.** The seriousness of the overreaching problem was highlighted recently by a June 20, 2005, letter to the current U.S. Secretary of Commerce and U.S. Trade Representative from Eric Garfinkel and Alan Dunn, two former Assistant Secretaries of Commerce who were the principal U.S. negotiators for antidumping rules in the Uruguay Round from 1989 to 2002. They wrote:

In our view, a number of WTO dispute settlement reports have misinterpreted the rules adopted during the Uruguay Round and have imposed on the United States not only obligations to which it did not agree, but obligations which it strongly and successfully opposed during those negotiations.

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... The “Zeroing” decisions are examples of overreaching by panels and the Appellate Body that threaten erosion of U.S. sovereignty through the imposition of obligations that the U.S. has strongly opposed and explicitly declined to take upon itself.

According to the Garfinkel-Dunn letter, the WTO Appellate Body had reversed the results of the Uruguay Round negotiations by prohibiting the so-called practice of “zeroing” in calculating margins in antidumping investigations. To achieve Congress’s negotiating objectives for trade remedies, the former secretaries argued that U.S. negotiators would have to restore the *status quo ante* by securing an agreement to eliminate obligations not agreed to by the United States.

### **DOHA RULES NEGOTIATIONS**

**WTO Mini-Ministerial in Dalian, China.** On July 12-13, 2005, a WTO mini-ministerial meeting took place in Dalian, China. In their summary of the meeting, the Co-Chairs identified the political desire of WTO Members to move the Doha Rules negotiations forward. They noted that Ministers reached a “broad agreement” to begin “text-based negotiations” in the Rules area “as soon as possible” so that “meaningful and substantial progress” can be made by the December 2005 Hong Kong Ministerial Conference.

While this hoped-for approach is relevant to continuing negotiations, to be successful it requires the U.S. to have addressed fully its negotiating objectives by making further and initial submissions and proposals concerning the issues where the U.S. has lost in dispute settlement proceedings and where the U.S. has proposed corrections. These areas are outlined in the *May 2005 Report* at 20-25.

**Majority of Current Proposals Would Weaken Trade Remedies.** Members have already made over 180 submissions in the Rules negotiations proposing more than 100 specific changes to the Antidumping Agreement alone. The majority of proposed changes to the WTO Agreements on antidumping, and subsidies and countervailing measures, however, would not “clarify” or “improve” trade remedy disciplines but, instead, would weaken them. There are also a host of ongoing WTO disputes (some involving zeroing in administrative reviews) which could adversely affect U.S. interests and, therefore, should be addressed in the negotiations.

**U.S. Action Required.** To date, U.S. submissions are insufficient to counterbalance the damage proposed by our trading partners. Much more remains to be done to ensure that the U.S. achieves Congress’ stated negotiating objectives for the Rules negotiations and the objectives of the Doha Negotiations themselves. Between now and December 2005, the U.S. needs to identify and promote its priority issues with respect to trade remedies at the three remaining meetings of the Negotiating Group on Rules. See *May 2005 Report* at 21-22 (initial U.S. proposals) and 23-25 (suggested U.S. proposals).

**ACTIVITIES RELATED TO COMMERCE'S METHODOLOGIES IN NME CASES**

The May 2005 Report of the Lawyers' Advisory Group reviewed a number of methodologies currently employed by the U.S. Department of Commerce in conducting antidumping (AD) proceedings involving imports from non-market economy (NME) countries. The report reviewed how these methodologies have created a lack of predictability in NME AD proceedings, as reflected in systemic biases and "bipolar" results (*i.e.*, the same methodology has produced a range of very high margins in some cases and a range of very low margins in other cases). *See May 2005 Report* at 26-30.

Since the May 2005 Report, Commerce has requested comments from the public concerning an array of proposals to change its NME AD methodology. These include the following *Federal Register* notices:

- ***Expected Non-Market Economy Wages: Request for Comment on Calculation Methodology***, 70 Fed. Reg. 37761 (June 30, 2005).

Commerce's practice is to calculate annually expected NME wages for use as surrogate values in NME AD proceedings. Commerce uses regression-based analysis to calculate wage rates reflective of the observed relationship between wages and national income in market economy countries. Commerce asks for public comment on its methodology in response to comments that have been submitted in several NME proceedings.

- ***Timing of Assessment Instructions for Antidumping Duty Orders Involving Non-Market Economy Countries***, 70 Fed. Reg. 35634 (June 21, 2005) (Request for comments).

Commerce asked (1) whether it should issue assessment instructions after initiation of an administrative review for entries from entities subject to the NME-wide rate for which a review was not requested, or (2) whether it should issue assessment instructions at the conclusion of an administrative review both for entries from entities reviewed and for entries from entities subject to the NME-wide rate for which a review was not requested.

- ***Market Economy Inputs Practice in Antidumping Proceedings Involving Non-Market Economy Countries***, 70 Fed. Reg. 30418 (May 26, 2005) (Request for Comments).

In NME proceedings, if an input is sourced from a market-economy supplier, and the volume of the imported input as a share of total purchases from all sources is "meaningful," Commerce's practice has been to value the entire input by using the average input price paid to market economy suppliers (in market economy currency). Commerce asked (1) whether it should change its practice of using market economy import prices to value an entire input, and (2) if it continues its current practice, what should the threshold be for the share or volume of a given input sourced from market economy suppliers to qualify as "meaningful"?

In each of the foregoing instances, Commerce should examine the issue based on whether the proposed changes to its methodology are consistent with, and will result in, the calculation of more accurate dumping margins in NME AD proceedings.