



WTO APPELLATE BODY DISSENT CLAIMS OVERREACH IN DECISION ABOUT DUTIES ON CHINESE GOODS

THE COMMITTEE TO SUPPORT U.S. TRADE LAWS FOR IMMEDIATE RELEASE:

(Washington, DC, July 19) – On July 16, 2019, the WTO Appellate Body (AB) released its report concerning issues developed in the Panel Report, “United States – Countervailing Duty Measures on Certain Products from China – Recourse to Article 21.5 of the DSU by China (Panel Report)”. The AB recognized that the US had demonstrated that China used State-Owned Enterprises (SOEs) to subsidize its economy, but stated that the US in applying its countervailing duty laws must use distorted Chinese prices to measure the subsidies without additional fact-finding by the Department of Commerce.

With this decision the WTO dispute settlement process has, once again, been used to weaken US trade laws, WTO rules, and harm US workers and businesses. The Committee To Support US Trade Laws (CSUSTL) warns that this decision is another example of overreach and engaging in fact-finding by the AB which is not authorized under Article 11 of the WTO’s Dispute Settlement Understanding. It is a practice by the AB that was never intended as part of the original WTO agreement. This has long been the view of the United States, but the AB’s decision in DS437 indicates that the U.S. view is also embraced by one of the members of the Appellate Body Division, who filed an extremely rare dissenting opinion stating that both the Panel and the AB exceeded their authority. This opinion potentially signals recognition by other members of the WTO that the Appellate Body has lost its way. The member’s opinion expresses concern about the AB’s overreach and urges future panels to consider the dissenting opinion under the mantle of Article 11, arguing that the AB has no authority to review a panel’s factual findings.

The dissenting member succinctly synopsised the problems with the Appellate Body’s decision: “This should have been a relatively simple issue for the Appellate Body to decide on appeal, for the Panel did not do its job in reviewing the USDOC record, and applied the wrong legal standard. However, I believe the work of the Division was made unduly complicated by the majority’s engagement with the evidence, effectively acting as a panel in the first instance, and, having done that, articulating an incoherent legal standard. I am aware that this dissent, also, does not make easy reading. But I thought it important to explain at length the errors at both the Panel and majority levels on this issue so that this dissent may serve as guidance for future litigants and panels.”

CSUSTL concurs with the dissenting opinion while applauding the member for the courage of conviction to address the AB’s latest overreach, and just as important, offering an admonition for future litigants to adhere to the limits imposed on the AB. The dissent continues “the majority appears to have assumed the role of a panel in drawing conclusions from its own analysis of the record evidence, rather than through an analysis of reasoning provided by the Panel. In my view, that would appear to exceed the Appellate Body’s mandate to review ‘issues of law covered in the panel report and legal interpretations developed by the panel.’” CSUSTL joins the member in the call to all participants in the dispute settlement process to return to the original intent of the agreement.



The dispute covered 17 separate U.S. countervailing duty investigations of Chinese goods, including pipe and tube products, solar panels, kitchen shelving, aluminum extrusions, and steel cylinders. “Unfortunately, this is another example of the WTO and the Appellate Body impeding U.S. efforts to use the subsidy laws to address unfair and distortive Chinese government practices,” said Tim Brightbill, chair of CSUSTL’s executive committee.

The Committee to Support U.S. Trade Laws (CSUSTL) is a national organization of companies, trade associations, labor unions, law firms and individuals located in all 50 states of the nation and is committed to preserving and enhancing U.S. trade laws and supporting trade policies that benefit the United States-based productive economy. CSUSTL consists of 423 companies and organizations representing 167 industries, including manufacturing, technology, agriculture, mining, energy, and services. We are dedicated to ensuring that the laws against unfair trade are not weakened through legislation or policy decisions in Washington, DC, in international negotiations, or through dispute settlement at the World Trade Organization (WTO) and elsewhere.

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