Estudo do CCGI n. 2

APLICAÇÃO SIMULTÂNEA DE MEDIDAS ANTIDUMPING E MEDIDAS COMPENSATÓRIAS

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O presente estudo visa esclarecer a possibilidade de aplicar medidas antidumping e medidas compensatórias, de forma simultânea, a um mesmo produto.

O art. VI:5 do GATT estabelece:

> No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to both anti-dumping and countervailing duties to compensate for the same situation of dumping or export subsidization.

Desse modo, o referido artigo evidencia a impossibilidade de aplicar ambas as medidas a um mesmo fato gerador, quando for verificada a existência de dumping e de subsídio à exportação, o que constituiria um *double remedy*. Entretanto, não haveria qualquer proibição acerca da aplicação simultânea das medidas, quando essas forem baseadas em fatos geradores distintos, ou seja, quando no cálculo do montante da medida antidumping aplicada não estiver incluído o valor referente ao subsídio recebido pelo produto, objeto de medida compensatória.

Além disso, a interpretação *restritiva* do artigo leva à conclusão de que a aplicação simultânea de medidas anti-dumping e de medidas compensatórias não seria irregular se o subsídio visado por estas últimas se tratar de subsídio acionável e não proibido.

1. A interpretação do painel US – Anti-dumping and Countervailing Duties

Nessa orientação, o painel *United States – Definitive Anti-dumping and Countervailing Duties on Certain Products from China (DS379)*, atualmente em apelação, afirma:

> 14.116 We note, first that the anti-dumping and countervailing duty instruments are provided for and addressed under two distinct agreements and are, with the notable exception of Article VI:5, addressed under distinct paragraphs of Article VI of the GATT 1994. Article VI:5, which precisely addresses the issue of double remedies, is the only provision under which any limitations are explicitly imposed on the concurrent use of the two remedies. It reads:"No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to both anti-dumping and countervailing duties to compensate for the same situation of dumping or export subsidization".

O problema se coloca na possibilidade de aplicação simultânea de medidas antidumping e medidas compensatórias referentes aos subsídios domésticos, ao qual o art. VI.5 do GATT não faz menção.

O referido painel afirma que:

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> 14.117 Thus, by its very terms, Article VI:5 of the GATT 1994 is limited to "situation[s] of [...] export subsidization". In our view, these terms are self-explanatory in their intention to limit the scope of the prohibition in Article VI:5 to situations involving export subsidies, to the exclusion of situations in which domestic subsidies are granted on exported goods. Such a narrow reading of the terms "situation of [...] export subsidization" is supported by the context to Article VI:5, and in particular by the distinction made between domestic vs. export subsidies in Article VI:3 of the GATT 1994, which deals with countervailing duties, and by the separate treatment accorded to export subsidies under Article XVI of the GATT 1994. These provisions demonstrate that the drafters intended to make a distinction between subsidies granted with respect to the production or manufacture of goods (i.e., domestic subsidies) and subsidies granted in respect of the export of goods (i.e., export subsidies). Further, we consider that this interpretation is confirmed by the principle of effet utile: since only imported goods are subject to anti-dumping or countervailing duties, reading Article VI:5 as encompassing situations in which domestic subsidies granted to exported goods are countervailed would effectively read the term "export" out of the relevant sentence of that provision. Finally, we note the use of terms equivalent to the expression "export subsidies" in both the French and the Spanish texts of Article VI:5.[1]
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> 14.118 Not only is Article VI:5 limited to potential double remedies in respect of export subsidies, but the explicit terms in which the drafters addressed the issue in that provision makes it all the more unlikely that they sought to prohibit the imposition of double remedies in respect of other types of subsidies through Article 19.4 of the SCM Agreement given, again, that Article 19.4 on its face makes no reference to that issue.[2]"
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> [1] The French text reads "à une même situation résultant du dumping ou de subventions à l'exportation", whereas the Spanish text reads: "una misma situación resultante del dumping o de las subvenciones a la exportación" (our emphasis).
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> [2] This is a further difference between the present dispute and the privatization and pass-through jurisprudence relied upon by China: neither of these two issues is addressed explicitly under any of the provisions of the covered agreements.

Assim, o painel estabelece que a restrição aos *double remedies* somente seria aplicável aos subsídios à exportação, não havendo qualquer vedação à aplicação de ambas as medidas a um mesmo fato gerador, quando forem constatados apenas dumping subsídios domésticos.

A China, por sua vez, argumenta que haveria uma proibição aos *double remedies* implícita no art. 19.4 do Acordo sobre Subsídios e Medidas Compensatórias (SCM). O artigo afirma que:

> No countervailing duty shall be levied[51] on any imported product **in excess** of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product.
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> [51] As used in this Agreement "levy" shall mean the definitive or final legal assessment or collection of a duty or tax." (grifo nosso)

Assim, a China argumenta que a aplicação de medidas compensatórias aos subsídios verificados quando esses já foram objeto de aplicação de medidas antidumping seria um excesso nos termos do art. 19.4, uma vez que o subsídio teria sido anulado pelas medidas antidumping, não restando qualquer margem de subsídio. O painel rejeita o argumento e afirma:

> 14.112 On its face, the terms of Article 19.4 of the SCM Agreement establish a limit to the amount of duties that may be "levied", and this limit is dependent only upon "the amount of the subsidy found to exist". Thus, by its own terms, Article 19.4 of the SCM Agreement is oblivious to any potential concurrent imposition of anti-dumping duties. Hence, that an anti-dumping duty calculated under a methodology may have the effect of "offsetting" a subsidy in totality or in part has no effect on the existence of the subsidy which, under Article 1 of the SCM Agreement, depends on the existence of a

> financial contribution and of a benefit; nor would it have an effect on the amount of the subsidy which, under Article 14 of the SCM Agreement, must be determined by reference to the marketplace.[2] In sum, the narrowly-crafted discipline contained in Article 19.4 of the SCM Agreement does not address situations of "double remedies".

O painel tece, ainda, considerações acerca do cálculo da margem de dumping em países que não apresentam uma economia de mercado (NME):

> 14.69 (...) conceptually, the dumping margin calculated under an NME methodology – i.e., the difference between the constructed normal value and the export price – reflects not only price discrimination by the investigated producer between the domestic and export markets ("dumping"), but also, in addition, the economic distortions that affect the producer's costs of production. Specific domestic subsidies granted to the producer of the good in question, in respect of that good – i.e., the same subsidies which are countervailed in the context of a countervailing duty investigation – are one of these economic distortions that are "captured" in the NME dumping margin calculation.[3] Expressed differently, the dumping margin calculated under an NME methodology generally is higher than would be the case otherwise because it results from a comparison of the export price to market-determined, and hence *unsubsidized*, costs of production, rather than to the producer's actual, subsidized (or distorted) costs of production.

O painel reconhece, assim, que, em virtude da metodologia aplicada às NME, a aplicação simultânea de medidas anti-dumping e medidas compensatórias configuraria, ao menos em parte, numa dupla compensação da mesma margem de proteção concedida, configurando um *double remedy*. O tema já havia sido tratado pela Rodada de Tóquio, mas foi descartado durante a Rodada Uruguai. Nestes termos, o painel alega ser clara a intenção das partes que, apesar de cientes do problema de *double remedies* no que tange os subsídios domésticos, jamais pretenderam incluir tal proibição na redação dos arts. 19.4 do Acordo de Subsídios e VI.5 do GATT. O Painel vai além e afirma, ainda, que tal proibição também não foi inserida no Protocolo de Acessão da China, mesmo sendo o problema de aplicação de *double* remedies previsível.

Ademais, a China alega que a aplicação de ambas as medidas simultaneamente seria inconsistente com o art. 19.3 do SCM:

> When a countervailing duty is imposed in respect of any product, such countervailing duty shall be levied, in the appropriate amounts in each case, on a nondiscriminatory basis on imports of such product from all sources found to be subsidized and causing injury, except as to imports from those sources which have renounced any subsidies in question or from which undertakings under the terms of this Agreement have been accepted.

O painel novamente rejeita o argumento e esclarece:

> We recall that countervailing duties are special duties that are collected for the purpose of "offsetting" subsidies. This suggests that, applying the reasoning of the EC – Salmon (Norway) panel, countervailing duties are collected in the appropriate amounts insofar as the amount collected does not exceed the amount of subsidy found to exist. We further recall our conclusions above that the manner in which the dumping margin is calculated – through an NME methodology or otherwise – has no impact on the existence of subsidies, which may be found to "exist" in a parallel countervailing duty

[2] Indeed, it is obvious that the mere issuance of an anti-dumping order cannot have the effect of changing the position of the recipient in the marketplace.

[3] That other distortions are also captured – for instance non-specific subsidies – is irrelevant; what matters is that those same distortions which are countervailed under Part V of the SCM Agreement are also captured by the NME dumping margin calculation.

> investigation; and that the fact that a "double remedy" may result from the imposition of anti-dumping duties does not transform these duties into countervailing duties under the covered agreements. For these reasons, the imposition of anti-dumping duties calculated under an NME methodology has no impact on whether the amount of the concurrent countervailing duty collected is "appropriate" or not.

Finalmente, a China alegou que a aplicação de *double remedies* frustraria os objetivos do SCM, que, conforme decisão do Órgão de Apelação, seria fortalecer as disciplinas do GATT relacionadas ao uso de subsídios e medidas compensatórias. O painel rejeita o argumento:

> 14.122 (...) We view China's argument as implying that it is the object and purpose of the SCM Agreement to impose disciplines not only with respect to the use of countervailing duties, but also of anti-dumping duties. As explained above, we are of the view that the object and purpose of Part V of the SCM Agreement is limited to imposition of disciplines with respect to the former.

A decisão do painel no que tange a aplicação simultânea de medidas antidumping e medidas compensatórias é questionável. Parece contraditório proibir *double remedies* apenas ao caso dos subsídios ilícitos – os subsídios à exportação – enquanto os subsídios acionáveis – os subsídios domésticos – poderiam ser objeto de sanção mais severa. As medidas de defesa comercial previstas no âmbito da OMC visam garantir às partes o equilíbrio das vantagens concedidas durante as negociações. As medidas antidumping e medidas compensatórias devem ser utilizadas apenas de maneira a anular as vantagens ocasionadas pelas práticas ao comércio inconsistentes com o GATT. Esse raciocínio é confirmado pelas previsões tanto do SCM quanto do Acordo Antidumping (arts. 19.4 e 9.3, respectivamente), que estabelecem que as medidas de defesa comercial **não devem ultrapassar**, respectiva mente, as margens de subsídios e dumping constatados. Assim, tais medidas não devem ser utilizadas de maneira a causar uma punição excessiva à parte que violou o acordo, sob pena de resultar em um novo desequilíbrio em favor da parte que aplicou as contramedidas.

Ao fazer uma interpretação textual, o painel deixou de analisar o GATT e seus acordos subsidiários de maneira sistemática, desconsiderando os impactos negativos que uma interpretação restritiva do art. 19 do SCM poderia trazer à lógica do sistema de defesa comercial proposto pela OMC. Vale frisar que o Órgão de Apelação (OA) no caso *US – 1916 Act (DS136)* estabeleceu que o Acordo sobre Anti-dumping e o artigo VI do GATT têm uma **estreita** relação, definindo, inclusive, que determinar a aplicabilidade de um deles para uma medida em análise significa, implicitamente, determinar a aplicabilidade do outro para esta mesma medida.

> 6.92-6.94 (…) Article VI and the Anti-Dumping Agreement are part of the same treaty: the WTO Agreement. In application of the customary rules of interpretation of international law, we are bound to interpret Article VI of the GATT 1994 as part of the WTO Agreement and, pursuant to Article 31 of the Vienna Convention, the Anti-Dumping Agreement forms part of the context of Article VI. This implies that we must look at Article VI and the Anti-Dumping Agreement as part of an ‘inseparable package of rights and obligations’ and that Article VI should not be interpreted in a way that would deprive either Article VI or the Anti-Dumping Agreement of meaning.

O OA utilizou, então, uma interpretação sistemática dos dois instrumentos jurídicos para fazer sua análise. No presente caso o painel parece ter tomado uma rota diametralmente oposta. Finalmente, cabe apontar que a China apelou da decisão do painel, que poderá ter algumas de suas interpretações reformadas pelo Órgão de Apelação.

2. **A compatibilidade da utilização de *double remedy* com a legislação interna americana**

No que tange à questão acerca da compatibilidade da aplicação de *double remedies*, a *United States Court of International Trade*, em duas importantes decisões recentes no caso GPX International Tire Corp. v. United States (18-09-2009 e 04-08-2010), determinou que tal prática, quando aplicada para NMEs, é inconsistente com sua regulação interna.

> (…) (T)he court finds that (Department of) Commerce failed to comply with the court's remand instructions. Commerce must forego the imposition of the countervailing duty law on the nonmarket economy ("NME") products before the court because its actions on remand clearly demonstrate its inability, at this time, to use improved methodologies to determine whether, and to what degree double counting occurs when NME antidumping remedies are imposed on the same good, or to otherwise comply with the unfair trade statutes in this regard. (page 3 - Consol. Court No. 08-00285)

Interessante notar que a argumentação utilizada pela Corte americana se baseia em análise muito similar àquela feita pelo Painel no caso DS379.

> In NME-designated countries, however, Commerce also "compares a subsidy-free constructed normal value (essentially using information from surrogate countries) with the original subsidized export price to calculate the AD margin.". Thus, any resulting NME AD margin in theory also captures the competitive advantage that subsidies may provide because the constructed NV is subsidy-free, and presumably higher than a subsidized NV, while the U.S. price presumably reflects in some way the price-lowering benefits of the subsidies. Thus, the margin is greater than it would be if subsidies were reflected on both sides of the comparison. These methodologies, therefore, when used concurrently, result in a high likelihood of double counting because they effectively counteract the same behavior twice. For this reason, the court held that Commerce may have the authority under the statutory scheme to apply CVD law and AD law simultaneously to products of a NME country, but only if such an application included methodologies to safeguard against this substantial potential for double counting, which does not occur when NV and U.S. price are calculated based on data from the same country the market economy approach. (pages 8 – 9 - Consol. Court No. 08-00285)

Verifica-se, assim, que a aplicação simultânea de medidas anti-dumping e medidas compensatórias que tenham por efeito gerar um *double remedy* são inconsistentes com a legislação americana.

3. **Novo caso em disputa na OMC**

Tal questão será ainda alvo de análise por outro painel no âmbito da OMC já que os EUA contestam a aplicação, simultânea, de medidas anti-dumping e compensatórias da China contra o aço americano (DS414 - China — Countervailing and Anti-Dumping Duties on Grain Oriented Flat-rolled Electrical Steel from the United States (Complainant: United States of America).