

X. Findings and Conclusion

624. For the reasons set out in this Report, the Appellate Body:

- (a) with respect to Article 9(5) of the Basic AD Regulation⁹³²:
 - (i) upholds the Panel's finding, in paragraph 7.77 of the Panel Report, that Article 9(5) of the Basic AD Regulation concerns not only the imposition of anti-dumping duties, but also the calculation of dumping margins, and that it could be challenged "as such" under Article 6.10 of the *Anti-Dumping Agreement*, which addresses the calculation of margins of dumping for each exporter or producer;
 - (ii) upholds, albeit for different reasons, the Panel's finding, in paragraph 7.98 of the Panel Report, that Article 9(5) of the Basic AD Regulation is inconsistent "as such" with Article 6.10 of the *Anti-Dumping Agreement*, because it conditions the determination of individual dumping margins for exporters or producers from NMEs on the fulfilment of the IT test;
 - (iii) upholds, albeit for different reasons, the Panel's finding, in paragraph 7.112 of the Panel Report, that Article 9(5) of the Basic AD Regulation is inconsistent "as such" with Article 9.2 of the *Anti-Dumping Agreement*, because it conditions the imposition of individual duties on exporters or producers from NMEs on the fulfilment of the IT test;
 - (iv) finds that, in making the findings that Article 9(5) of the Basic AD Regulation is inconsistent "as such" with Articles 6.10 and 9.2 of the *Anti-Dumping Agreement*, the Panel did not act inconsistently with Article 11 of the DSU;
 - (v) declares moot and of no legal effect the Panel's finding, in paragraph 7.127 of the Panel Report⁹³³, that Article 9(5) of the Basic AD Regulation is inconsistent with the MFN obligation in Article I:1 of the GATT 1994;
 - (vi) upholds the Panel's finding, in paragraph 7.137 of the Panel Report⁹³⁴, that the European Union has acted inconsistently with Article XVI:4 of the

⁹³²See also Panel Report, para. 8.2(a).

⁹³³See also Panel Report, para. 8.2(a).

WTO Agreement and Article 18.4 of the *Anti-Dumping Agreement* by failing to ensure the conformity of its laws, regulations, and administrative procedures with its obligations under the relevant agreements;

- (vii) upholds the Panel's finding, in paragraph 7.148 of the Panel Report⁹³⁵, that Article 9(5) of the Basic AD Regulation is inconsistent with Articles 6.10 and 9.2 of the *Anti-Dumping Agreement* "as applied" in the fasteners investigation;
- (b) with respect to the Panel's findings under Articles 4.1 and 3.1 of the *Anti-Dumping Agreement*⁹³⁶:
 - (i) finds that the Panel erred in finding, in paragraph 7.230 of the Panel Report, that "the European Union did not act inconsistently with Article 4.1 of the [*Anti-Dumping Agreement*] in defining a domestic industry comprising producers accounting for 27 per cent of total estimated EU production of fasteners" on the basis that the collective output of these producers represented "a major proportion" of the total domestic production;
 - (ii) finds that the Panel did not err in finding, in paragraph 7.241 of the Panel Report, that China failed to establish that the European Union acted inconsistently with Article 3.1 of the *Anti-Dumping Agreement* in the selection of a sample of the domestic industry for purposes of making an injury determination; and
 - (iii) finds that the Panel did not err in its interpretation or application of Articles 4.1 and 3.1 of the *Anti-Dumping Agreement*, or acted inconsistently with Article 11 of the DSU and Article 17.6 of the *Anti-Dumping Agreement*, when finding, in paragraph 7.219 of the Panel Report, that "the mere fact that the domestic industry as ultimately defined does not include any particular proportion of producers expressing different views with respect to the complaint, or producers who did not come forward within the 15 day period, does not demonstrate that the European Union acted inconsistently with Article 4.1 of the [*Anti-Dumping Agreement*] in defining the domestic industry" or acted inconsistently with Article 3.1 of that Agreement;

⁹³⁴ See also Panel Report, para. 8.2(a).

⁹³⁵ See also Panel Report, para. 8.2(b).

⁹³⁶ See also Panel Report, para. 8.3(b).

- (c) with respect to the Panel's findings regarding certain aspects of the dumping determination in the fasteners investigation:
- (i) finds that the Panel did not err in finding, in paragraph 7.494 of the Panel Report⁹³⁷, that the European Union violated Article 6.4 of the *Anti-Dumping Agreement* "by not providing a timely opportunity for Chinese producers to see information regarding the product types on the basis of which normal value was established";
 - (ii) finds that the Panel did not err in finding, in paragraph 7.495 of the Panel Report⁹³⁸, that "the Chinese exporters could not defend their interests in this investigation because the Commission only provided information concerning the product types used in the determination of the normal value at a very late stage of the proceedings" and that, therefore, "the European Union acted inconsistently with Article 6.2" of the *Anti-Dumping Agreement*;
 - (iii) finds that the Panel did not act inconsistently with Article 11 of the DSU in not addressing China's argument that the European Union failed to inform the interested parties of the "product types" it used to compare the export price and normal value;
 - (iv) finds that the Panel erred in its application of Article 2.4 of the *Anti-Dumping Agreement* by failing to take into account the last sentence of Article 2.4 in the light of the relevant facts of the case and of its finding under Article 6.4 of the *Anti-Dumping Agreement*; and finds, instead, that, in not disclosing the information on the product types on a timely basis, the European Union acted inconsistently with Article 2.4 of the *Anti-Dumping Agreement* by failing to indicate to the parties in question what information was necessary to ensure a fair comparison;
 - (v) finds that the Panel did not err in its interpretation of Article 2.4 of the *Anti-Dumping Agreement* when finding, in paragraph 7.306 of the Panel Report, that the European Union did not act inconsistently with Article 2.4 of that Agreement by not making adjustments for every element of the PCN;

⁹³⁷ See also Panel Report, para. 8.2(e).

⁹³⁸ See also Panel Report, para. 8.2(e).

- (vi) finds that the Panel did not act inconsistently with Article 11 of the DSU, when finding, in paragraph 7.302 of the Panel Report, that there is no inherent reason to conclude that every element of the PCN necessarily reflects a difference that affects price comparability; and
 - (vii) finds that the Panel did not err in its interpretation and application of Article 2.4 of the *Anti-Dumping Agreement* in finding, in paragraph 7.311 of the Panel Report, that the European Union did not have to make adjustments for alleged quality differences;
- (d) with respect to Articles 6.5 and 6.5.1 of the *Anti-Dumping Agreement*:
- (i) upholds the Panel's findings, in paragraphs 7.516 and 7.517 of the Panel Report⁹³⁹, that the European Union failed to ensure that the domestic producers, Agrati and Fontana Luigi, provide appropriate statements of the reasons why information provided in confidence was not susceptible of summary;
 - (ii) finds that China's claim under Article 6.5 that the European Union failed to establish that "good cause" existed to support the confidential treatment of information submitted by the analogue country producer participating in the investigation, Pooja Forge, was within the Panel's terms of reference; but finds that China failed to substantiate this claim; and therefore
 - (iii) reverses the Panel's finding, in paragraph 7.525 of the Panel Report⁹⁴⁰, that the European Union acted inconsistently with its obligations under Article 6.5 with respect to the treatment of confidential information submitted by Pooja Forge; and
 - (iv) upholds the Panel's finding, in paragraph 7.455 of the Panel Report⁹⁴¹, that the European Union did not act inconsistently with its obligations under Article 6.5 when the Commission granted the request to treat the identity of the complainants and the supporters of the complaint as confidential; and

⁹³⁹ See also Panel Report, para. 8.2(f).

⁹⁴⁰ See also Panel Report, para. 8.2(f).

⁹⁴¹ See also Panel Report, para. 8.3(h).

- (v) finds that China's claim under Article 11 of the DSU regarding the confidential treatment of the identity of the complainants and the supporters of the complaint is not within the scope of this appeal because it was not included in China's Notice of Other Appeal;
- (e) reverses the Panel's finding, in paragraph 7.458 of the Panel Report, that China's claims under Articles 6.2 and 6.4 of the *Anti-Dumping Agreement* regarding the non-disclosure of the identity of the complainants were within its terms of reference under Article 6.2 of the DSU; and therefore, declares moot the Panel's finding, in paragraph 7.459 of the Panel Report⁹⁴², that the European Union did not act inconsistently with Articles 6.2 and 6.4 of the *Anti-Dumping Agreement* by not disclosing the identity of the complainants and the supporters of the complaint; and
- (f) with respect to Article 6.1.1 of the *Anti-Dumping Agreement*:
 - (i) upholds the Panel's finding, in paragraph 7.579 of the Panel Report⁹⁴³, that the "'Market Economy Treatment and/or Individual Treatment claim form' is not a 'questionnaire' within the meaning of Article 6.1.1"; and that, therefore, the European Union did not act inconsistently with its obligations under Article 6.1.1 of the *Anti-Dumping Agreement* when it did not provide the Chinese exporters with 30 days to submit their responses; and
 - (ii) finds that China's claims under Article 11 of the DSU and Article 17.6 of the *Anti-Dumping Agreement* regarding the Market Economy Treatment and/or Individual Treatment Claim Form are not within the scope of this appeal because these claims were not included in China's Notice of Other Appeal.

625. The Appellate Body recommends that the DSB request the European Union to bring its measures, found in this Report and in the Panel Report as modified by this Report, to be inconsistent with the *Anti-Dumping Agreement* and the *WTO Agreement*, into conformity with its obligations under those Agreements.

Signed in the original in Geneva this 19th day of June 2011 by:

⁹⁴²See also Panel Report, para. 8.3(h).

⁹⁴³See also Panel Report, para. 8.3(k).

Shotaro Oshima
Presiding Member

Jennifer Hillman
Member

David Unterhalter
Member