

6 FINDINGS AND CONCLUSIONS IN THE APPELLATE BODY REPORT WT/DS454/AB/R

6.1. In the appeal of the Panel Report, *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan*, WT/DS454/R and Add.1 (Japan Panel Report), for the reasons set out in this Report:

- a. with respect to the Panel's findings under Article 6.5 of the Anti-Dumping Agreement, the Appellate Body:
 - i. finds that the Panel did not err in its interpretation and application of Article 6.5 of the Anti-Dumping Agreement;
 - ii. finds that the Panel did not act inconsistently with Article 11 of the DSU and Article 17.6(i) of the Anti-Dumping Agreement; and, consequently,
 - iii. upholds the Panel's findings, in paragraphs 7.290, 7.297-7.303, and 8.1.b. of the Japan Panel Report, that China acted inconsistently with Article 6.5 of the Anti-Dumping Agreement because MOFCOM permitted the full text of the reports contained in appendix V and appendix VIII to the petition, appendix 59 to the petitioners' supplemental evidence of 1 March 2012, and the appendix to the petitioners' supplemental evidence of 29 March 2012 to remain confidential without objectively assessing the petitioners' showing of "good cause";
- b. with respect to the Panel's findings under Articles 3.1 and 3.2 of the Anti-Dumping Agreement, the Appellate Body:
 - i. finds that the Panel erred in its interpretation of Article 3.2 of the Anti-Dumping Agreement in finding that, in its consideration of whether there has been a significant price undercutting, an investigating authority may simply consider whether dumped imports sell at lower prices than comparable domestic products;
 - ii. reverses the Panel's findings, in paragraphs 7.130, 7.144, and 8.2.a.i of the Japan Panel Report, rejecting Japan's claim that MOFCOM acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement by failing to consider whether Grade C dumped imports had any price undercutting effect on domestic Grade C products, in the sense of placing downward pressure on those domestic prices by being sold at lower prices; and
 - iii. completes the legal analysis and finds that MOFCOM's assessment of whether there had been a significant price undercutting by Grade C imports, as compared with the price of domestic Grade C, is inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement;
- c. with respect to the Panel's findings under Articles 3.1 and 3.4 of the Anti-Dumping Agreement, the Appellate Body:
 - i. finds that Japan's argument, that MOFCOM failed to examine whether dumped imports provided explanatory force for the state of the domestic industry, did not constitute a separate claim under Articles 3.1 and 3.4 of the Anti-Dumping Agreement; and consequently declares moot and of no legal effect the Panel's findings in paragraphs 6.29-6.31 and footnote 274 of the Japan Panel Report; and
 - ii. finds that the Panel erred in its interpretation of Articles 3.1 and 3.4 of the Anti-Dumping Agreement to the extent it found that the results of the inquiries under Article 3.2 are not relevant to the impact analysis under Article 3.4; and consequently reverses the Panel's findings in paragraphs 7.170 and 8.2.a.ii of the Japan Panel Report;

- d. with respect to the Panel's findings under Articles 3.1 and 3.5 of the Anti-Dumping Agreement, the Appellate Body:
- i. finds that the Panel did not act inconsistently with Article 6.2 of the DSU by addressing Japan's claims under Article 3.5 of the Anti-Dumping Agreement regarding "MOFCOM's reliance on the market share of subject imports", in paragraphs 7.180-7.188 of the Japan Panel Report;
 - ii. finds that the Panel did not act inconsistently with Article 11 of the DSU by ruling on a matter that was not before it, or making the case for Japan;
 - iii. upholds the Panel's findings, in paragraphs 7.188, 7.205, and 8.1.a.iii of the Japan Panel Report, that China acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement because MOFCOM improperly relied on the market share of dumped imports, and its flawed price effects and impact analyses, in determining a causal link between dumped imports and material injury to the domestic industry, and made no finding of cross-grade price effects whereby price undercutting by Grade B and C imports might be shown to affect the prices of domestic Grade A HP-SSST;
 - iv. upholds the Panel's finding, in paragraphs 7.204, 7.205, and 8.1.a.iv of the Japan Panel Report, that China acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement because MOFCOM failed to ensure that the injury caused by the decrease in apparent consumption and the increase in domestic production capacity was not attributed to the dumped imports; and
 - v. finds that the Panel did not act inconsistently with Article 11 of the DSU, in concluding, in paragraph 7.192 of the Japan Panel Report, that Japan had not advanced independent Article 3.5 claims – other than those regarding MOFCOM's reliance on market shares and MOFCOM's non-attribution analysis – concerning MOFCOM's price effects and impact analyses.

6.2. The Appellate Body recommends that the DSB request China to bring its measures found in this Report, and in the Japan Panel Report as modified by this Report, to be inconsistent with the Anti-Dumping Agreement and the GATT 1994, into conformity with its obligations under those Agreements.

Signed in the original in Geneva this 25th day of September 2015 by:

Peter Van den Bossche
Presiding Member

Thomas Graham
Member

Ricardo Ramírez-Hernández
Member

6 FINDINGS AND CONCLUSIONS IN THE APPELLATE BODY REPORT WT/DS460/AB/R

6.1. In the appeal of the Panel Report, *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union*, WT/DS460/R and Add.1 (EU Panel Report), for the reasons set out in this Report:

- a. with respect to the Panel's findings under Articles 2.2.1 and 2.2.2 of the Anti-Dumping Agreement, the Appellate Body:
 - i. upholds the Panel's findings, in paragraphs 7.49 and 7.51 of the EU Panel Report, that the European Union's panel request complies with the requirement in Article 6.2 of the DSU to provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly in respect of the European Union's claims under Articles 2.2.1 and 2.2.2 of the Anti-Dumping Agreement; and that these claims were thus within the Panel's terms of reference;
 - ii. finds that the Panel did not err in its interpretation and application of Article 2.2.2 of the Anti-Dumping Agreement;
 - iii. finds that the Panel did not act inconsistently with Articles 11 and 12.7 of the DSU and Article 17.6(i) of the Anti-Dumping Agreement; and consequently
 - iv. upholds the Panel's finding, in paragraphs 7.66 and 8.6.a. of the EU Panel Report, that China acted inconsistently with Article 2.2.2 of the Anti-Dumping Agreement by failing to determine an SG&A amount for SMST on the basis of actual data pertaining to production and sales in the ordinary course of trade of the like product;
- b. with respect to the Panel's findings under Article 6.7 and paragraph 7 of Annex I to the Anti-Dumping Agreement, the Appellate Body upholds the Panel's finding, in paragraphs 7.101 and 8.6.c. of the EU Panel Report, that China acted inconsistently with Article 6.7 and paragraph 7 of Annex I by rejecting SMST's request for rectification only on the basis that it was not provided prior to verification;
- c. with respect to the Panel's findings under Article 6.5 of the Anti-Dumping Agreement, the Appellate Body:
 - i. finds that the Panel did not err in its interpretation and application of Article 6.5 of the Anti-Dumping Agreement;
 - ii. finds that the Panel did not act inconsistently with Article 11 of the DSU and Article 17.6(i) of the Anti-Dumping Agreement; and consequently
 - iii. upholds the Panel's finding, in paragraphs 7.290, 7.297-7.303, and 8.6.e. of the EU Panel Report, that China acted inconsistently with Article 6.5 of the Anti-Dumping Agreement because MOFCOM permitted the full text of the reports contained in appendix V and appendix VIII to the petition, appendix 59 to the petitioners' supplemental evidence of 1 March 2012, and the appendix to the petitioners' supplemental evidence of 29 March 2012 to remain confidential without objectively assessing the petitioners' showing of "good cause";
- d. with respect to the Panel's findings under Article 6.9 of the Anti-Dumping Agreement, the Appellate Body:
 - i. finds that the Panel erred in its interpretation and application of Article 6.9 of the Anti-Dumping Agreement; and consequently reverses the Panel's findings, in paragraphs 7.235, 7.236, and 8.7.d.i. of the EU Panel Report, rejecting the European Union's claim that China acted inconsistently with Article 6.9 of the Anti-Dumping Agreement because MOFCOM failed to disclose adequately the essential facts in connection with the data underlying MOFCOM's determination of dumping concerning SMST and Tubacex; and

- ii. completes the legal analysis and finds that China acted inconsistently with Article 6.9 of the Anti-Dumping Agreement because MOFCOM failed to disclose adequately the essential facts in connection with the data underlying MOFCOM's determination of dumping concerning SMST and Tubacex;
- e. with respect to the Panel's findings under Articles 3.1 and 3.2 of the Anti-Dumping Agreement, and in connection with MOFCOM's price effects analysis, the Appellate Body:
 - i. finds that the Panel erred in its interpretation of Article 3.2 of the Anti-Dumping Agreement in finding that, in its consideration of whether there has been a significant price undercutting, an investigating authority may simply consider whether dumped imports sell at lower prices than comparable domestic products;
 - ii. reverses the Panel's findings, in paragraphs 7.130, 7.144, and 8.7.b.i. of the EU Panel Report, rejecting the European Union's claim that MOFCOM acted inconsistently with Articles 3.1 and 3.2 by failing to consider whether Grade C dumped imports had any price undercutting effect on domestic Grade C products, in the sense of placing downward pressure on those domestic prices by being sold at lower prices;
 - iii. completes the legal analysis and finds that MOFCOM's assessment of whether there had been a significant price undercutting by Grade C imports, as compared with the price of domestic Grade C, is inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement; and
 - iv. reverses the Panel's findings, in paragraphs 7.143, 7.144, and 8.7.b.i. of the EU Panel Report; and finds instead that MOFCOM's assessment of whether there had been a significant price undercutting by the dumped imports, as compared with the prices of the domestic like product, is inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement;
- f. with respect to the Panel's findings under Articles 3.1 and 3.4 of the Anti-Dumping Agreement, and in connection with MOFCOM's impact analysis, the Appellate Body finds that the Panel erred in its interpretation of Articles 3.1 and 3.4 of the Anti-Dumping Agreement to the extent it found that the results of the inquiries under Article 3.2 are not relevant to the impact analysis under Article 3.4; and consequently reverses the Panel's findings in paragraphs 7.170 and 8.7.b.ii of the EU Panel Report;
- g. with respect to the Panel's finding that China acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement, the Appellate Body:
 - i. finds that the Panel did not act inconsistently with Article 11 of the DSU by ruling on a matter that was not before it, or, making the case for the European Union;
 - ii. upholds the Panel's findings, in paragraphs 7.188, 7.205, and 8.6.d.iii of the EU Panel Report, that China acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement because MOFCOM improperly relied on the market share of dumped imports, and its flawed price effects and impact analyses, in determining a causal link between dumped imports and material injury to the domestic industry, and made no finding of cross-grade price effects whereby price undercutting by Grade B and C imports might be shown to affect the price of domestic Grade A HP-SSST;
 - iii. upholds the Panel's finding, in paragraphs 7.204, 7.205, and 8.6.d.iv of the EU Panel Report, that China acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement because MOFCOM failed to ensure that the injury caused by the decrease in apparent consumption and the increase in domestic production capacity was not attributed to the dumped imports; and

- iv. finds that the Panel did not act inconsistently with Article 11 of the DSU, in concluding, in paragraph 7.192 of the EU Panel Report, that the European Union had not advanced independent Article 3.5 claims – other than those concerning MOFCOM's reliance on market shares and MOFCOM's non-attribution analysis – concerning MOFCOM's price effects and impact analyses; and
- h. with respect to the Panel's designation of business confidential information (BCI) and its adoption of BCI Procedures, the Appellate Body declares moot and of no legal effect the Panel's findings and legal reasoning developed in paragraphs 7.21-7.25 and 7.27-7.29 of the EU Panel Report, and does not find it necessary to make further findings on this matter in order to resolve the present dispute.
- 6.2. The Appellate Body recommends that the DSB request China to bring its measures found in this Report, and in the EU Panel Report as modified by this Report, to be inconsistent with the Anti-Dumping Agreement and the GATT 1994, into conformity with its obligations under those Agreements.

Signed in the original in Geneva this 25th day of September 2015 by:

Peter Van den Bossche
Presiding Member

Thomas Graham
Member

Ricardo Ramírez-Hernández
Member
