

8 CONCLUSIONS AND RECOMMENDATIONS

8.1 Complaint by Japan (DS454)

8.1.1 Conclusions

8.1. We uphold Japan's claims that:

- a. China's injury determination is inconsistent with Articles 3.1, 3.2, 3.4 and 3.5 of the Anti-Dumping Agreement, because:
 - i. MOFCOM failed to properly account for differences in quantities when comparing the price of Grade C subject imports with the domestic Grade C price in its price effects analysis, contrary to Articles 3.1 and 3.2 of the Anti-Dumping Agreement;
 - ii. MOFCOM failed to properly evaluate the magnitude of the margin of dumping in considering the impact of subject imports on the domestic industry, contrary to Articles 3.1 and 3.4 of the Anti-Dumping Agreement;
 - iii. MOFCOM improperly relied on the market share of subject imports, and its flawed price effects and impact analyses, in determining a causal link between subject imports and material injury to the domestic industry, contrary to Articles 3.1 and 3.5 of the Anti-Dumping Agreement; and
 - iv. MOFCOM failed to ensure that injury caused by the decrease in apparent consumption and the increase in production capacity was not attributed to subject imports, contrary to Articles 3.1 and 3.5 of the Anti-Dumping Agreement;
- b. MOFCOM allowed certain information supplied by the petitioners to remain confidential without objectively assessing "good cause" or scrutinizing the petitioners' showing of "good cause", contrary to Article 6.5 of the Anti-Dumping Agreement;
- c. China acted inconsistently with Article 6.5.1 of the Anti-Dumping Agreement by failing to require petitioners to provide sufficiently detailed non-confidential summaries of information treated as confidential, or explanations as to why summarization was not possible;
- d. China acted inconsistently with Article 6.9 of the Anti-Dumping Agreement by failing to adequately disclose essential facts in connection with:
 - i. the methodology used to calculate the margins of dumping for SMI and Kobe; and
 - ii. import prices, domestic prices, and price comparisons considered by MOFCOM in its injury determination;
- e. China's application of provisional measures for a period exceeding four months is inconsistent with Article 7.4 of the Anti-Dumping Agreement;
- f. China acted inconsistently with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement by failing to set forth in sufficient detail in its Final Determination notice or a separate report the reasons why MOFCOM considered it appropriate to apply the highest margin of dumping calculated for cooperating exporters as the all others rate for Japanese companies other than SMI and Kobe;
- g. As a consequence of the inconsistencies described above, China's anti-dumping measures on HP-SSST from Japan are also inconsistent with Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994.

8.2. We reject Japan's claims that:

- a. China's injury determination is inconsistent with Articles 3.1, 3.2, 3.4 and 3.5 of the Anti-Dumping Agreement, because:
 - i. MOFCOM failed to consider whether Grade C subject imports had any price undercutting effect on domestic Grade C products, and improperly extended its findings of price undercutting in respect of Grades B and C to the domestic like product as a whole, contrary to Articles 3.1 and 3.2 of the Anti-Dumping Agreement; and
 - ii. MOFCOM failed to undertake a segmented analysis, and failed to properly weigh the positive and negative injury factors, when assessing the impact of subject imports on the domestic industry, contrary to Articles 3.1 and 3.4 of the Anti-Dumping Agreement;
- b. China's reliance on facts available to calculate the dumping margin for all Japanese companies other than SMI and Kobe is inconsistent with Article 6.8 and Paragraph 1 of Annex II to the Anti-Dumping Agreement;
- c. China acted inconsistently with Article 6.9 of the Anti-Dumping Agreement by failing to adequately disclose essential facts in connection with:
 - i. the data underlying MOFCOM's determination of dumping in respect of SMI and Kobe; and
 - ii. the determination and the calculation of the dumping margins for all Japanese companies other than SMI and Kobe.
- d. China acted inconsistently with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement by failing to set forth in sufficient detail in its Final Determination notice or a separate report:
 - i. relevant information concerning pricing information underlying MOFCOM's price undercutting findings; and
 - ii. the facts leading to the conclusion that the use of facts available was warranted to calculate the all others rate, and the facts that were used to determine the all others rate.

8.3. In light of the conclusions set forth in paragraphs 8.1 and 8.2 above, we do not consider it necessary to rule on Japan's claim that China acted inconsistently with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement by failing to set forth in sufficient detail in its Final Determination notice or a separate report MOFCOM's treatment, in the context of its price effects analysis, of the difference between the volume of Grade C subject imports and the volume of Grade C domestic products.

8.1.2 Recommendations

8.4. Pursuant to Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, to the extent China has acted inconsistently with certain provisions of the Anti-Dumping Agreement, we conclude that China has nullified or impaired benefits accruing to Japan under that Agreement.

8.5. Pursuant to Article 19.1 of the DSU, having found that China acted inconsistently with certain provisions of the Anti-Dumping Agreement, we recommend that China bring its measures into conformity with its obligations under that Agreement.

8.2 Complaint by the European Union (DS460)

8.2.1 Conclusions

8.6. We uphold the European Union's claims that:

- a. 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. China acted inconsistently with Article 2.4 of the Anti-Dumping Agreement by failing to address SMST's request for an adjustment to ensure a fair comparison between the export price and the normal value for Grade C;
- c. China acted inconsistently with Article 6.7 and Paragraph 7 of Annex I of the Anti-Dumping Agreement by rejecting SMST's request for rectification only on the basis that it was not provided prior to verification;
- d. China's injury determination is inconsistent with Articles 3.1, 3.2, 3.4 and 3.5 of the Anti-Dumping Agreement, because:
 - i. MOFCOM failed to properly account for differences in quantities when comparing the price of Grade C subject imports with the domestic Grade C price in its price effects analysis, contrary to Articles 3.1 and 3.2 of the Anti-Dumping Agreement;
 - ii. MOFCOM failed to properly evaluate the magnitude of the margin of dumping in considering the impact of subject imports on the domestic industry, contrary to Articles 3.1 and 3.4 of the Anti-Dumping Agreement;
 - iii. MOFCOM improperly relied on the market share of subject imports, and its flawed price effects and impact analyses, in determining a causal link between subject imports and material injury to the domestic industry, contrary to Articles 3.1 and 3.5 of the Anti-Dumping Agreement; and
 - iv. MOFCOM failed to ensure that injury caused by the decrease in apparent consumption and the increase in production capacity was not attributed to subject imports, contrary to Articles 3.1 and 3.5 of the Anti-Dumping Agreement;
- e. MOFCOM allowed certain information supplied by the petitioners to remain confidential without objectively assessing "good cause" or scrutinizing the petitioners' showing of "good cause", contrary to Article 6.5 of the Anti-Dumping Agreement;
- f. China acted inconsistently with Article 6.5.1 of the Anti-Dumping Agreement by failing to require petitioners to provide sufficiently detailed non-confidential summaries of information treated as confidential, or explanations as to why summarization was not possible;
- g. China acted inconsistently with Article 6.9 of the Anti-Dumping Agreement by failing to adequately disclose essential facts in connection with:
 - i. the methodology used to calculate the margins of dumping for SMST and Tubacex; and
 - ii. import prices, domestic prices, and price comparisons considered by MOFCOM in its injury determination;
- h. China's application of provisional measures for a period exceeding four months is inconsistent with Article 7.4 of the Anti-Dumping Agreement;

- i. China acted inconsistently with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement by failing to set forth in sufficient detail in its Final Determination notice or a separate report the reasons why MOFCOM considered it appropriate to apply the highest margin of dumping calculated for cooperating exporters as the all others rate for European Union companies other than SMST and Tubacex;
- j. As a consequence of the inconsistencies described above, China's anti-dumping measures on HP-SSST from the European Union are also inconsistent with Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994.

8.7. We reject the European Union's claims that:

- a. China acted inconsistently with Article 6.8 and paragraphs 3 and 6 of Annex II to the Anti-Dumping Agreement by applying facts available in respect of certain information that SMST sought to rectify at verification;
- b. China's injury determination is inconsistent with Articles 3.1, 3.2, 3.4 and 3.5 of the Anti-Dumping Agreement, because:
 - i. MOFCOM failed to consider whether Grade C subject imports had any price undercutting effect on domestic Grade C products, and improperly extended its findings of price undercutting in respect of Grades B and C to the domestic like product as a whole, contrary to Articles 3.1 and 3.2 of the Anti-Dumping Agreement; and
 - ii. MOFCOM failed to undertake a segmented analysis, and failed to properly weigh the positive and negative injury factors, when assessing the impact of subject imports on the domestic industry, contrary to Articles 3.1 and 3.4 of the Anti-Dumping Agreement;
- c. China's reliance on facts available to calculate the dumping margin for all European Union companies other than SMST and Tubacex is inconsistent with Article 6.8 and Paragraph 1 of Annex II to the Anti-Dumping Agreement;
- d. China acted inconsistently with Article 6.9 of the Anti-Dumping Agreement by failing to adequately disclose essential facts in connection with:
 - i. the data underlying MOFCOM's determination of dumping in respect of SMST and Tubacex; and
 - ii. the determination and the calculation of the dumping margins for all European Union companies other than SMST and Tubacex.
- e. China acted inconsistently with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement by failing to set forth in sufficient detail in its Final Determination notice or a separate report:
 - i. relevant information concerning pricing information underlying MOFCOM's price undercutting findings; and
 - ii. the facts leading to the conclusion that the use of facts available was warranted to calculate the all others rate, and the facts that were used to determine the all others rate.

8.8. In light of the conclusions set forth in paragraphs 8.6 and 8.7 above, we do not consider it necessary to rule on the European Union's claims that:

- a. China acted inconsistently with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement by failing to set forth in sufficient detail in its Final Determination notice or a separate report MOFCOM's treatment, in the context of its price effects analysis, of the difference

between the volume of Grade C subject imports and the volume of Grade C domestic products; and

- b. China acted inconsistently with Articles 2.2.1 and 2.2.1.1 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.

8.9. Consistent with our terms of reference, we find that the Article 2.2.1 claim advanced by the European Union in its first written submission falls outside our terms of reference. We also find that the Article 2.2.1.1 claims advanced by the European Union in its first written submission pertaining to MOFCOM's use of data that allegedly were not in accordance with GAAP, did not reasonably reflect the costs associated with the product under consideration, and were historically utilized by SMST, fall outside our terms of reference.

8.2.2 Recommendations

8.10. Pursuant to Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, to the extent China has acted inconsistently with certain provisions of the Anti-Dumping Agreement, we conclude that China has nullified or impaired benefits accruing to the European Union under that Agreement.

8.11. Pursuant to Article 19.1 of the DSU, having found that China acted inconsistently with certain provisions of the Anti-Dumping Agreement, we recommend that China bring its measures into conformity with its obligations under that Agreement. The second sentence of Article 19.1 provides the Panel with the discretion to suggest ways in which China might implement this recommendation. In this regard, the European Union has proposed specific suggestions for us to make, and requested the Panel to formulate other suggestions⁵³⁹ Given the complexities to which implementation may give rise, we decline to exercise our discretion under the second sentence of Article 19.1 in the manner requested by the European Union.

⁵³⁹ European Union's first written submission, para. 338; and second written submission, paras. 180 and 184.