

WTO Dispute Panel Finds China In Violation Of Anti-Dumping Agreement

On July 25, 2011, the European Union (EU) requested consultations with China concerning the imposition of definitive anti-dumping duties on x-ray security inspection equipment from the EU, pursuant to China's Ministry of Commerce (MOFCOM) Notice No. 1(2011) (the Notice), including its Annex. The dispute concerned MOFCOM's January 2011 decision to impose anti-dumping duties on imports of x-ray scanners from the EU, ranging from 33.5 percent to 71.8 percent for five years.

The EU claimed the anti-dumping duties imposed by China, and the underlying investigation conducted by the Chinese authorities, were inconsistent with various procedural and substantive provisions of the World Trade Organization (WTO) Anti-Dumping Agreement. Procedural concerns included China's failure to provide access to relevant information and an insufficient explanation of the basis for its determination. Substantive concerns included the absence of an objective examination of the effect of the dumped imports on prices in China and the absence of objective determination of causality between the import price and the alleged injury to the domestic industry. The EU also argued that the Notice was inconsistent with a number of procedural provisions under Articles 6.5.1, 6.9 and 12.2.2 of the Anti-Dumping Agreement, and certain substantive claims under Article 3 of the Anti-Dumping Agreement and Articles VI:1 and VI:6(a) of the GATT 1994.

In its February 26, 2013 report, the WTO Dispute Panel (the Panel) largely agreed with the EU's complaint that China did not base its decision to impose the duties on an objective assessment of the evidence and that it failed to adequately explain its findings to the companies involved. The Panel identified nine separate violations of the WTO Anti-Dumping Agreement by China, and recommended China bring its determination into conformity with its obligations under the Agreement.

I. Substantive Claims

A. PRICE EFFECTS ANALYSIS

The EU claimed that MOFCOM's price effects findings did not constitute an objective examination based on positive evidence, contrary to the obligations under Articles 3.1 and 3.2 of the Anti-Dumping Agreement. The basis for the EU's claim was that MOFCOM's price effects methodology was flawed because it involved price comparisons, based on weighted-average unit values, in circumstances where MOFCOM did not take into account the "considerable differences" among the products being compared, particularly between "high-energy" and "low-energy" scanners. According to the EU, the distorting effects of the methodology followed by MOFCOM were exacerbated by the fact that during the period of investigation there were no exports of high-energy scanners from the EU to China.

The Panel upheld the EU's claims against MOFCOM's price effects analysis, on the basis that MOFCOM failed to ensure that the prices it was comparing as a part of its price effects analysis were actually comparable. In particular, the Panel concluded that MOFCOM's price undercutting and price suppression analyses were inconsistent with Articles 3.1 and 3.2 because they were not based on an objective examination of positive evidence.

B. FINDINGS OF INJURY TO THE DOMESTIC INDUSTRY

The EU claimed that MOFCOM did not base its injury finding on positive evidence, that MOFCOM's injury evaluation did not involve an assessment of all relevant economic factors and that MOFCOM's injury analysis ignored the positive state of the domestic industry. The EU claimed that MOFCOM instead found "material injury" based on a limited number of negative factors, ignoring the overall development and interaction among the positive and negative factors. The EU claimed that, as a result, China violated Articles 3.1 and 3.4 of the Anti-Dumping Agreement.

The Panel rejected the EU's claim that MOFCOM did not rely upon positive evidence in making its determination, after concluding the EU had not presented adequate evidence in this regard. However, the Panel concluded that China acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement because MOFCOM failed to consider all relevant economic factors, in particular the "magnitude of the margin of dumping," in its injury determination. In the light of its findings under Articles 3.1 and 3.2 of the Anti-Dumping Agreement, the Panel exercised judicial economy regarding whether MOFCOM acted inconsistently with Article 3.4 by failing to take into account the differences between high-energy and low-energy scanners.

C. CAUSALITY

The EU claimed that MOFCOM attributed the injured state of the domestic industry to the imported x-ray scanners covered by the investigation based on a flawed volume effects analysis and a flawed price effects analysis. Further, the EU claimed that MOFCOM's non-attribution analysis was inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement because MOFCOM disregarded the actual causes of any negative condition of the domestic industry.

The Panel concluded that MOFCOM acted inconsistently with Articles 3.1 and 3.5 as a result of (i) its failure to take into consideration differences between the products under consideration in the price effects analysis and (ii) its failure to provide a reasoned and adequate explanation regarding how the prices of the dumped imports caused price suppression within the domestic industry. The Panel exercised judicial economy with respect to MOFCOM's analysis of the effect of the volume of subject imports. Finally, the Panel concluded that MOFCOM failed to consider certain "known factors," such as the financial crisis of 2008 and the domestic industry's start-up status. The Panel also found MOFCOM failed to consider certain evidence relating to factors that it did explicitly consider, in violation of Article 3.5, which requires investigating authorities to evaluate the effects of known factors other than the dumped imports that at the same time injure the domestic industry and not to attribute the effects of these factors to imports.

II. Procedural Claims

A. TREATMENT OF NON-CONFIDENTIAL SUMMARIES

In the course of an anti-dumping investigation, certain confidential information may be submitted to the investigating authorities. Article 6.5.1 of the Anti-Dumping Agreement

requires parties submitting confidential information to provide non-confidential summaries. These summaries are required to be “in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence.” Article 6.5.1 provides an exception for the requirement to provide a non-confidential summary in “exceptional circumstances,” but requires parties to indicate the reasons why a summary is not possible.

The EU challenged two aspects of MOFCOM's treatment of non-confidential summaries. First, the EU identified a number of instances in which MOFCOM allegedly accepted non-confidential summaries provided by domestic supplier Nuctech that were not adequate to give the EU a reasonable understanding of the substance of the information submitted in confidence, as required by Article 6.5.1 of the Anti-Dumping Agreement. Second, the EU claimed that MOFCOM exempted the Public Security Bureau from submitting any non-confidential summaries of confidential information without providing a justification for applying the “exceptional circumstances” mechanism, as required by Article 6.5.1. The EU also pursued dependent claims under Articles 6.2 and 6.4 of the Anti-Dumping Agreement.

For the most part, the Panel upheld the EU's claims that the non-confidential summaries provided by Nuctech were not adequate, and thus were contrary to Article 6.5.1. The Panel also upheld the EU's claim that MOFCOM had improperly invoked the Article 6.5.1 “exceptional circumstances” mechanism by failing to require a statement of reasons why the relevant confidential information could not be summarized. The Panel exercised judicial economy with respect to the EU's dependent claims under Articles 6.2 and 6.4.

B. DISCLOSURE OF ESSENTIAL FACTS

The EU claimed that, in violation of Article 6.9 of the Anti-Dumping Agreement, MOFCOM

failed to disclose certain essential facts to interested parties, including: (i) the underlying data and methodology used by MOFCOM in its price analysis, (ii) adjustments made by MOFCOM to the export price with respect to sales to an affiliated distributor, (iii) the data and adjustments applied by MOFCOM in determining the margin of dumping and (iv) the available facts used by MOFCOM to establish the residual anti-dumping duty. The EU also pursued dependent claims under Articles 6.2 and 6.4.

For the most part, the Panel upheld the EU's claims under Article 6.9. In doing so, the Panel was guided by the findings of the report of the Appellate Body in *China – Countervailing and Anti-dumping Duties on Grain Oriented Flat-rolled Electrical Steel from the United States*, which was circulated during the Panel's proceedings. The Panel determined that MOFCOM should have disclosed the average unit values and underlying price data that it would use to analyze price effects of the dumped imports. The Panel exercised judicial economy regarding whether MOFCOM should have disclosed its price effects methodology and with respect to the dependent claims under Articles 6.2 and 6.4.

C. PUBLIC NOTIFICATION

The EU claimed that China violated Article 12.2.2 of the Anti-Dumping Agreement because of alleged shortcomings in the content of MOFCOM's public notice of affirmative determination providing for the imposition of definitive anti-dumping duties. The EU made two types of claims under Article 12.2.2. First, the EU claimed that MOFCOM failed to include in its public notice certain relevant information on the matters of fact and law which led to the imposition of final measures. Second, the EU claimed that MOFCOM failed to include in its public notice the reasons for rejecting relevant arguments made by the respondent during the course of the investigation.

The Panel upheld the EU's claims under Article 12.2.2 regarding MOFCOM's failure to provide relevant information regarding its price effects analysis and its determination of the residual rate. However the Panel determined that anti-dumping margins were not required to be included in the public notice. The Panel further found that Article 12.2.2 does not require that all "essential facts" underlying the margin of dumping be included in the public notice. Consequently, the Panel rejected the EU's claims regarding the calculations and underlying data for the margin of dumping and the calculations for the residual rate for all other producers.

III. Next Steps

Both sides are reviewing the Panel's decision and have until the end of April to determine whether to file an appeal with the WTO's Appellate Body.

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