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Panel Proceedings

**CHINA – ANTI-DUMPING MEASURES ON STAINLESS STEEL
PRODUCTS FROM JAPAN**
(DS601)

THIRD PARTY EXECUTIVE SUMMARY OF AUSTRALIA

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China – Broiler Products	Panel Report, <i>China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States</i> , WT/DS427/R and Add.1, adopted 25 September 2013, DSR 2013:IV, p. 1041
China – HP-SSST (EU)/China – HP-SSST (Japan)	Appellate Body Reports, <i>China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan / China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union</i> , WT/DS454/AB/R and Add.1 / WT/DS460/AB/R and Add.1, adopted 28 October 2015, DSR 2015:IX, p. 4573
China – GOES	Appellate Body Report, <i>China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States</i> , WT/DS414/AB/R , adopted 16 November 2012, DSR 2012:XII, p. 6251
China – X-Ray Equipment	Panel Report, <i>China – Definitive Anti-Dumping Duties on X-Ray Security Inspection Equipment from the European Union</i> , WT/DS425/R and Add.1, adopted 24 April 2013, DSR 2013:III, p. 659
EC – Fasteners (China)	Appellate Body Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China</i> , WT/DS397/AB/R , adopted 28 July 2011, DSR 2011:VII, p. 3995
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EC – Tube or Pipe Fittings	Panel Report, <i>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil</i> , WT/DS219/R , adopted 18 August 2003, as modified by Appellate Body Report WT/DS219/AB/R , DSR 2003:VII, p. 2701
EU – Footwear (China)	Panel Report, <i>European Union – Anti-Dumping Measures on Certain Footwear from China</i> , WT/DS405/R , adopted 22 February 2012, DSR 2012:IX, p. 4585
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Thailand – H-Beams	Appellate Body Report, <i>Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland</i> , WT/DS122/AB/R , adopted 5 April 2001, DSR 2001:VII, p. 2701
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US – Hot-Rolled Steel	Appellate Body Report, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , WT/DS184/AB/R , adopted 23 August 2001, DSR 2001:X, p. 4697

I. INTRODUCTION

1. These proceedings initiated by Japan raise important questions of legal interpretation and proper application of key provisions in the Anti-Dumping Agreement.

2. Australia's submissions have focussed on key provisions relating to an investigating authority's definition of a domestic industry (Article 4.1), determination of injury (Articles 3.1, 3.2, 3.4 and 3.5), treatment of confidential information (Article 6.5), disclosure of essential facts (Article 6.9) and explanations in public notices (Article 12.2). In particular, Australia has:

- (i) observed that an investigating authority bears the responsibility for ensuring that a broadly defined product under investigation does not introduce a material risk of distortion in terms of how the domestic industry is defined and in its injury analysis;
- (ii) outlined that flaws in an investigating authority's definition of the domestic industry necessarily give rise to a material risk of distortion in its injury analysis;
- (iii) outlined the importance of an investigating authority undertaking its injury analysis in a manner that is objective and based on positive evidence; and
- (iv) emphasised that compliance with due process obligations is an essential element of ensuring anti-dumping duties are applied consistently with the requirements set out in the Anti-Dumping Agreement.

II. DOMESTIC INDUSTRY

3. Australia recalls that the definition of "domestic industry" is a "keystone" of an anti-dumping investigation.¹ It sets the scope of the investigation and lays the foundation for the injury and causation analyses required under Article 3 of the Anti-Dumping Agreement.

4. An investigating authority has an obligation under Article 4.1 of the Anti-Dumping Agreement to define the domestic industry in a way that ensures the definition is reflective of "domestic producers as a whole of the like products" or those whose collective output "constitutes a major proportion of the total domestic production" of the like products.²

5. Australia recalls jurisprudence emphasising that "an investigating authority must not act so as to give rise to a material risk of distortion in defining the domestic industry" and that "an investigating authority bears the obligation to ensure that the way in which it defines the domestic industry does not introduce a material risk of skewing the economic data and, consequently, distorting its analysis of the state of the industry".³

6. Australia submits that if an investigating authority does not properly define "domestic industry" in accordance with Article 4.1 of the Anti-Dumping Agreement, and in an objective manner and based on positive evidence, there will necessarily be a material risk of distortion in its subsequent injury analysis.

¹ Panel report, *EC – Tube or Pipe Fittings*, para. 7.397.

² Article 4.1 Anti-Dumping Agreement.

³ Appellate Body report, *EC – Fasteners (China)*, paras. 413–416.

III. INJURY

7. Article 3.1 of the Anti-Dumping Agreement requires that an injury determination involve an "objective examination" and be based on "positive evidence".⁴ Australia observes that "Article 3.1 of the Anti-Dumping Agreement 'is an overarching provision that sets forth a Member's fundamental, substantive obligation' with respect to the injury determination, and 'informs the more detailed obligations in succeeding paragraphs [of Article 3]'" .⁵

A. PRICE COMPARABILITY

8. Australia recalls the jurisprudence establishing that the Anti-Dumping Agreement requires an investigating authority to ensure that it is comparing "like with like" for the purposes of its price effects analysis.⁶ This is on the basis that "if subject import and domestic prices were not comparable, this would defeat the explanatory force that subject import prices might have for the depression or suppression of domestic prices."⁷ Accordingly, price comparability needs to be considered in all price effects analyses to ensure that the injury determination involves an objective examination based on positive evidence.⁸

9. Australia submits that China's interpretation that only significant differences in *price* will trigger the price comparability obligation does not reflect the totality of circumstances in which price comparability must be considered. The requirement to ensure price comparability where there are significant differences in the physical characteristics or uses of product types was confirmed in *China – X-Ray Equipment*.⁹ Therefore, Australia submits that where there are differences in the physical characteristics and uses of the product under investigation, including as a result of a broadly defined product under investigation, an investigating authority must take these differences into account to ensure price comparability.¹⁰

10. Australia considers that an investigating authority's failure to ensure price comparability brings into question whether an investigating authority's price effects analysis was undertaken in an objective manner and was based on positive evidence, as required under Articles 3.1 and 3.2 of the Anti-Dumping Agreement.

B. IMPACT ANALYSIS

11. Article 3.4 of the Anti-Dumping Agreement requires an investigating authority to evaluate "*all* relevant economic factors and indices" that have a bearing on the state of the domestic industry concerned in examining injury, including consideration of the 15 prescribed factors.¹¹

⁴ Article 3.1 Anti-Dumping Agreement.

⁵ Appellate Body report, *China – GOES*, para. 126, citing Appellate Body Report, *Thailand – H-Beams*, para. 106.

⁶ Panel report, *China – Autos (US)*, para 7.277. See also Appellate Body report, *China – GOES*, para. 200, Panel report, *China – X-Ray Equipment*, para. 7.65 and Panel report, *China – Broiler Products*, para 7.483.

⁷ Appellate Body report, *China – GOES*, para. 200.

⁸ Panel report, *Korea – Pneumatic Valves (Japan)*, para. 7.266. See also panel reports, *China – X-Ray Equipment*, para.7.68; *Pakistan – BOPP Film (UAE)*, para. 7.309; *China – Autos (US)*, para. 7.277.

⁹ Panel report, *China – X-Ray Equipment*, paras. 7.68, 7.85 and 7.92. See also Panel Reports *China – Autos (US)* paras. 7.256 and 7.277; *China – Broiler Products*, paras. 7.476 – 7.479; *Pakistan – BOPP Film (UAE)*, paras. 7.309 – 7.310.

¹⁰ Panel report, *China – X-Ray Equipment*, para. 7.85.

¹¹ Appellate Body reports, *EC – Tube or Pipe Fittings*, para. 156; *Thailand – H-Beams*, para. 128.

12. Australia submits that, consistent with the requirements of Article 3.1 of the Anti-Dumping Agreement, an investigating authority must explain "in a satisfactory way why the evaluation of the injury factors set out under Article 3.4 led to the determination of material injury, including an explanation of why factors which would seem to lead in the other direction do not, overall, undermine the conclusion of material injury".¹²

13. Where there are positive movements in a number of factors, Australia submits that a panel should also consider whether an investigating authority provided "a compelling explanation of why and how, in light of such apparent positive trends, the domestic industry [is], or remain[s], injured".¹³

C. NON-ATTRIBUTION

14. The third sentence of Article 3.5 of the Anti-Dumping Agreement includes a "non-attribution" requirement, which requires an investigating authority to examine any "known factors" other than the dumped imports which at the same time are injuring the domestic industry. Australia's view is that where interested parties have made the investigating authority aware of factors that may be causing injury to the domestic industry, those factors are "known factors".¹⁴ In the case at issue in these proceedings, the "known factors" were fluctuations in nickel prices, and the effects of stricter environmental standards.

15. Once these "known factors" have been identified, an investigating authority is required to separate and distinguish the injurious effects of those known factors from the injurious effects of the dumped imports.¹⁵ Australia submits that an investigating authority has an obligation to provide a satisfactory explanation of the nature and extent of the injurious effects of those known factors, as distinguished from the injurious effects of the alleged dumping.¹⁶

IV. DUE PROCESS

16. Australia considers that the due process obligations in Articles 6 and 12 of the Anti-Dumping Agreement are critically important.

A. TREATMENT OF CONFIDENTIAL INFORMATION

17. Australia submits that the role of a panel assessing an allegation of a breach of Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement is not to undertake a *de novo* review of the evidence on record to determine whether "good cause" to treat information as confidential was objectively demonstrated, or if a summary or claim that summarization was not possible was objectively adequate.¹⁷ Instead, the panel should assess whether it is discernible from an investigating authority's final determination or any supporting documents (and in light of the nature of the information at issue, and the reasons given by the submitting

¹² Panel report, *Korea – Certain Paper*, para. 7.272.

¹³ Panel report, *Thailand – H-Beams*, para. 7.249.

¹⁴ Panel report, *EU – Footwear (China)*, para. 7.484. See also Panel report, *Thailand – H-Beams*, para. 7.273.

¹⁵ Appellate Body report, *US – Hot-Rolled Steel (2001)*, para. 223.

¹⁶ Appellate Body report, *US – Hot-Rolled Steel (2001)*, para. 226.

¹⁷ See, for example, Appellate Body reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.97, *Korea – Pneumatic Valves (Japan)*, para. 5.221 and *Russia – Commercial Vehicles*, para. 5.102.

party in its request for confidentiality) that it met the standard required by Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement.¹⁸

B. DISCLOSURE OF ESSENTIAL FACTS

18. Australia observes that Article 6.9 of the Anti-Dumping Agreement has been interpreted to require an investigating authority to "disclose such facts, in a coherent way, so as to permit an interested party to understand the basis for the decision whether or not to apply definitive measures."¹⁹ Australia submits that this requirement is critical to ensuring the provision of procedural fairness to all interested parties.

19. Australia submits that the determination of which facts are "essential" will depend on the nature and scope of the particular substantive obligations, the content of the particular findings needed to satisfy the substantive obligations at issue, and the factual circumstances of each case.²⁰

C. PUBLIC NOTICE

20. Australia notes that the purpose of Article 12.2 of the Anti-Dumping Agreement requires any public notice (or separate report) to set out in "sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities".²¹ Australia submits that the purpose of Article 12.2 of the Anti-Dumping Agreement is to provide transparency of the authority's decision-making at crucial points of the investigation.²² Australia agrees with the Appellate Body's observation that parties affected by the imposition of anti-dumping duties "are entitled to know, as a matter of fairness and due process, the facts, law and reasons that have led to the imposition of such duties".²³

V. CONCLUSION

21. Australia's submissions outline Australia's understanding of the obligations contained in key provisions of the Anti-Dumping Agreement.

22. Australia acknowledges that an investigating authority has discretion in defining the scope of the product under investigation in an anti-dumping investigation. However, even where the product under investigation is broadly defined, an investigating authority has a responsibility to ensure its injury determination is objective and is based on positive evidence. A broad product scope has implications for the injury determination, including how the investigating authority assesses price comparability and conducts its price effects analysis.

Australia emphasises again the importance of the due process obligations in Articles 6 and 12 of the Anti-Dumping Agreement, including to allow interested parties the opportunity to defend their interests during an anti-dumping investigation, or to seek review of an anti-dumping measure through domestic avenues or WTO dispute settlement.

¹⁸ Appellate Body report, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.97.

¹⁹ Appellate Body report, *China – GOES*, para. 240. See also Appellate Body report *Russia – Commercial Vehicles*, para. 5.177.

²⁰ Appellate Body reports, *Russia – Commercial Vehicles*, para. 5.220, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.130.

²¹ Article 12.2, Anti-Dumping Agreement.

²² Panel report, *Mexico – Corn Syrup*, para. 7.104.

²³ Appellate Body report, *China – GOES*, para. 258.