Before the World Trade Organization

Panel Proceedings

CHINA – ANTI-DUMPING MEASURES ON STAINLESS STEEL PRODUCTS FROM JAPAN

(DS601)

AUSTRALIA'S RESPONSES TO THE PANEL'S QUESTIONS

19 July 2022

<u>Q1</u> In paragraph 36 of its third-party submission, the United States contends that "[e]ven if MOFCOM's definition were to meet the "major proportion" of domestic production standard of Article 4.1 of the Anti-Dumping Agreement, the Panel should assess whether MOFCOM's definition of the domestic industry was biased or designed to favour the interest of any group of interested parties in the investigation, inconsistent with Article 3.1 of the AD Agreement.

<u>b. Other third parties</u>. Please clarify whether it is your view that a domestic industry defined consistently with Article 4.1 of the Anti-Dumping Agreement may nonetheless be inconsistent with Article 3.1 of the Anti-Dumping Agreement. Please explain your answer including, in particular, with reference to the text of Article 3.1.

1. Australia's view is that Articles 3.1 and 4.1 of the Anti-Dumping Agreement deal with distinct but interrelated concepts, being injury determination and the definition of a domestic industry, respectively. Australia notes that how an investigating authority defines the "domestic industry" under Article 4.1 of the Anti-Dumping Agreement will have repercussions in terms of an investigating authority's injury analysis under Article 3 of the Anti-Dumping Agreement.

2. Australia observes that the definition of "domestic industry" under Article 4.1 of the Anti-Dumping Agreement is central to an investigating authority's determination of injury under Article 3.1 of the Anti-Dumping Agreement, as outlined in detail in our written submission.[1] We recall, in particular, that in *EC – Fasteners (China)*, the Appellate Body explained that "the domestic industry forms the basis on which an investigating authority makes the determination of whether the dumped imports cause or threaten to cause material injury to the domestic producers", and this injury determination "must be based on 'positive evidence'".[2] Australia recalls that the Appellate Body went on to emphasise 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]

3. In Australia's view an investigating authority that defined "domestic industry" in a manner that gave rise to a material risk of distortion would act inconsistently with the

[1] Australia's third party submission, paras. 10-13.
[2] Appellate Body report, *EC – Fasteners (China)*, para. 413.
[3] Appellate Body report, *EC – Fasteners (China)*, paras. 413–416.

obligation in Article 4.1 to properly identify a "major proportion of the total domestic production".

Q3 In paragraph 184 of its first written submission, China contends that the obligation to ensure price comparability in the injury context is triggered only if, *inter alia*, the investigation covers various product types, which have price differences between them that are significant.

a. Please explain whether Articles 3.2 or 3.1 support the view that the obligation to ensure price comparability in the injury context arises only if price differences between various product types are "significant". If yes, why? If no, why not?

4. Australia's view is that Articles 3.1 and 3.2 require price comparability to be ensured any time an investigating authority makes price comparisons in its consideration of price effects.[4] This is because price comparability is necessary for ensuring a proper consideration of the "explanatory force" that subject imports have on the relevant price effect.[5] Nothing in the text or context of Articles 3.1 and 3.2 supports the view that the obligation to ensure price comparability arises only in the limited circumstances advanced by China.

5. Australia agrees that significant price differences will trigger the obligation to ensure price comparability. However, Australia disagrees with China's assertion that these are the *only* differences which give rise to an obligation to ensure price comparability.

6. Australia's view is that the statement that "the obligation to ensure price comparability in the injury context arises only if price differences between various product types are "significant"" oversimplifies the circumstances in which the obligation to ensure price comparability will be triggered.

7. As outlined in Australia's written submission,[6] the obligation to ensure price comparability will *also* be triggered if the products within a "basket" of goods are significantly different – that is, there are significant differences in the physical characteristics and/or uses of the different product types. Significant differences in the physical characteristics or uses of product types will affect the competitive relationship between the product types and must be

[4] Appellate Body reports *China – GOES*, para. 200; *Korea – Pneumatic Valves (Japan)*, paras. 5.233 – 5.234, 5.324 – 5.326; Panel reports *China –X-Ray Equipment*, paras. 7.50 and 7.68; *China – Autos (US)* paras. 7.256 and 7.277; *Pakistan – BOPP Film (UAE)*, paras. 7.309 – 7.310; *China – Broiler Products*, paras. 7.476 – 7.479.
[5] Appellate Body report, *China – GOES*, para. 200.
[6] Australia's third party submission, paras. 17-20.

taken into account, in order to ensure there is an "explanatory force" between subject imports and the relevant price effect.[7] This is irrespective of whether there are also price differences, significant or otherwise. The requirement to ensure price comparability where there are significant differences in the physical characteristics or uses of product types has been confirmed by panels in *China – X-Ray Equipment* and *EU – Biodiesel (Indonesia)*.[8]

Q4 At paragraph 118 of its first written submission, China argues that because MOFCOM's findings on price effects were based on the best information available and because Japan has not presented claims under Article 6.8 and Annex II of the Anti-Dumping Agreement, Japan's claims ought to be dismissed.

Please comment on whether the resort to best information available by an investigating authority for a particular aspect of its determination *ipso facto* precludes a challenge to that aspect of the determination under a provision of the Anti-Dumping Agreement other than Article 6.8 and Annex II thereof?

8. Australia does not agree with China's submission that the omission of any claims based on Article 6.8 and Annex II of the Anti-Dumping Agreement should, in and of itself, lead to dismissal of Japan's claims under Articles 3.1 and 3.2 of the Anti-Dumping Agreement, on the basis that MOFCOM's price effects findings were based on the best information available. This is because Article 6.8, and Articles 3.1 and 3.2, deal with separate and distinct obligations.

9. As outlined by the panel in *US-Hot Rolled Steel*, Article 6.8 and Annex II advance one of the goals of the Anti-Dumping Agreement, which is to ensure objective decision-making based on facts.[9] To the extent that the conditions in Article 6.8 are met, an investigating authority may rely on "facts available", while also observing the provisions in Annex II. In the absence of a claim under Article 6.8, Australia notes that it would be beyond a panel's terms of reference to determine whether use of the "facts available" was consistent with that article and Annex II of the Anti-Dumping Agreement.

10. In circumstances where the use of "facts available" is not subject to dispute, a panel may nevertheless be asked to determine whether an investigating authority acted consistently with other provisions of the Anti-Dumping Agreement. Relevant to this case is the question of

[7] Appellate Body report, *China – GOES*, para. 200.
[8] Panel reports, *China – X-Ray Equipment*, paras. 7.68, 7.85 and 7.92; *EU – Biodiesel (Indonesia)*, para. 7.158. 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.
[9] Panel report, *US – Hot Rolled Steel*, paras. 7.72 and 7.55.

whether MOFCOM's price effects analysis (including with regards to price comparability) was based on "positive evidence" and an "objective examination", in light of the best information that was available to MOFCOM.

Q7 China takes the view that a determination such as the product scope that is not subject to substantive obligations under the Anti-Dumping Agreement is also not subject to substantive obligations under Article 6.9 of the Anti-Dumping Agreement.[10]

Please explain the basis of Japan's disagreement with this view.

11. Australia disagrees with China's assertion that the facts underlying a product scope determination are necessarily exempt from the disclosure obligations in Article 6.9 of the Anti-Dumping Agreement. This assertion is inconsistent with the text of the Anti-Dumping Agreement and with the jurisprudence, which clarifies that facts underpinning intermediate findings and conclusions may be within the scope of the Article 6.9 disclosure obligation.

12. Article 6.9 requires the disclosure of "essential facts under consideration which form the basis for the decision whether to apply definitive measures". In *China – GOES* the Appellate Body explained that "essential facts" refers to "those facts that are significant in the process of reaching a decision as to whether or not to apply definitive measures" and that such disclosures are "paramount for ensuring the ability of the parties concerned to defend their interests".[11]

13. In *China – HP-SSST (Japan) / China – HP-SSST (EU)*, the Appellate Body clarified that facts relevant to "intermediate findings and conclusions" about dumping, injury to the domestic industry, and a causal link between the dumping and injury, may be "essential" for the purposes of Article 6.9.[12] The Appellate Body also explained that "whether a particular fact is essential or "significant in the process of reaching a decision" depends 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, including the arguments and evidence submitted by the interested parties".[13] The panel

[10] China's first written submission, para. 759.
[11] Appellate Body report, *China – GOES*, para. 240.
[12] Appellate Body report, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.130. See also Appellate Body Report, *Russia – Commercial Vehicles*, para. 5.178; Panel report, *Ukraine – Ammonium Nitrate*, para. 7.204.
[13] Appellate Body report, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.130. See also Appellate Body report, *Russia – Commercial Vehicles*, para. 5.178; Panel report, *Ukraine – Ammonium Nitrate*, para. 7.203.

in *Ukraine – Ammonium Nitrate* confirmed that "essential facts" will include "facts that would be necessary to understand the factual basis of the intermediate findings" of an investigating authority, including data.[14]

14. The Panel should consider whether, in the particular factual circumstances of this case, the information underpinning MOFCOM's product scope determination was "essential", in the sense that it was "significant in the process of reaching a decision" as to whether or not to apply measures. In this context, Australia observes that an investigating authority's product scope determination is critical in an investigation. The product scope underpins the investigating authority's determinations of dumping, injury to the domestic industry, and causation.

[14] Panel report, *Ukraine – Ammonium Nitrate*, para. 7.204.