

# EC – FASTENERS (CHINA)<sup>1</sup>

## (DS397)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	China	ADA Arts. 2.4, 4.1, 6.2, 6.4, 6.5, 6.10, 9.2 China's Accession Protocol	Establishment of Panel	23 October 2009
			Circulation of Panel Report	3 December 2010
Respondent	European Union		Circulation of AB Report	15 July 2011
			Adoption	28 July 2011

### 1. MEASURE AND PRODUCT AT ISSUE

- **Measure at issue:** (i) Art. 9(5) of the European Union's basic anti-dumping regulation (Basic AD Regulation), concerning individual treatment of exporters from certain non-market economies (NMEs) in anti-dumping investigations; and (ii) the imposition by the European Union of definitive anti-dumping duties on certain iron or steel fasteners from China.
- **Product at issue:** Iron or steel fasteners.

### 2. SUMMARY OF KEY PANEL/AB FINDINGS

- **ADA Arts. 6.10 (evidence – individual dumping margins) and 9.2 (imposition of anti-dumping duties – individual exporters or producers):** The Appellate Body upheld, although for different reasons, the Panel's findings that Art. 9(5) of the Basic AD Regulation was inconsistent as such and as applied in the fasteners investigation with Arts. 6.10 and 9.2 because it conditioned the granting of individual treatment to exporters or producers from NMEs in the determination and imposition of anti-dumping duties on the fulfilment of the individual treatment test. The Appellate Body found that Arts. 6.10 and 9.2 require investigating authorities to determine and impose individual anti-dumping duties on exporters or producers unless specific exceptions are provided for in the covered agreements. It further found that no specific exceptions are provided for in the covered agreements that would allow investigating authorities to determine and impose country-wide anti-dumping duties on exporters originating in NMEs. Neither does China's Accession Protocol provide a legal basis for flexibility in respect of export prices or for justifying an exception to the requirement to determine individual dumping margins in Art. 6.10
- **ADA Art. 4.1 (definition of domestic industry):** The Appellate Body found that the European Union acted inconsistently with Art. 4.1 in defining the domestic industry in the fasteners investigation as comprising producers accounting for 27 per cent of total estimated EU production of fasteners. The domestic industry defined on this basis did not consist of those producers "whose collective output of the products constitutes a major proportion of the total domestic production" within the meaning of Art. 4.1.
- **ADA Arts. 6.4 and 6.2 (evidence – access):** The Appellate Body agreed with the Panel that, by failing to disclose information regarding the product types used for the basis of price comparisons in the dumping determination, the European Union violated Art. 6.4 and thereby Art. 6.2.
- **ADA Art. 2.4 (dumping determination – fair comparison):** The Appellate Body agreed with the Panel that the European Union did not violate Art. 2.4 by not making adjustments for certain physical and quality differences alleged by China. It however reversed the Panel's finding on the last sentence of Art. 2.4 and held that the European Union had failed to indicate the information necessary to ensure a fair comparison as required by that provision.

### 3. OTHER ISSUES<sup>2</sup>

- **ADA Art. 6.5 (disclosure of confidential information – "good cause"):** The Appellate Body found that an investigating authority must ensure that where producers request confidential treatment of information provided during an investigation, such request is supported by "good cause", and is accompanied by a non-confidential summary.

<sup>1</sup> *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*

<sup>2</sup> Other issues addressed: scope of appellate review (DSU Art. 17.6); Appellate Body Working Procedures (sufficiency of Notice of Other Appeal); requirements of panel request (DSU Art. 6.2).

## EC – FASTENERS (CHINA) (ARTICLE 21.5 – CHINA)<sup>1</sup> (DS397)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	China	ADA Arts. 2.4, 2.4.2., 3.1, 4.1, 6.1.2, 6.2, 6.4, 6.5 DSU Art. 21.5	Establishment of Panel	18 December 2013
			Circulation of Panel Report	7 August 2015
Respondent	European Union		Circulation of AB Report	18 January 2016
			Adoption	12 February 2016

### 1. MEASURE TAKEN TO COMPLY WITH THE DSB RECOMMENDATIONS AND RULINGS

- **Measure at issue:** The European Commission's review investigation.
- **Product at issue:** Iron or steel fasteners from China.

### 2. SUMMARY OF KEY PANEL/AB FINDINGS

- **ADA Art. 2.4 (dumping determination – fair comparison):** The Appellate Body agreed with the Panel that the European Union had acted inconsistently with Art. 2.4, by failing to provide Chinese producers with information relating to the characteristics of products used for purposes of constructing normal value. The Appellate Body explained that, under certain circumstances, an investigating authority might have to disclose information needed to make a request for adjustments that would ensure a fair comparison of export price and normal value. The Appellate Body also agreed with the Panel that for purposes of calculating the dumping margin, the European Union had failed to take account of "all comparable export transactions" by excluding from the comparison between normal value and export price certain models, for which it could not find matching models, sold by an analogue country producer. However, the Appellate Body reversed the Panel's finding that in the process of determining normal value the European Union did not have to consider making adjustments accounting for differences in taxation and other cost factors, such as efficiency, productivity and access to raw materials.
- **ADA Art. 6.1.2 (evidence – access):** Unlike the Panel, the Appellate Body found that, under certain circumstances, an analogue country producer involved in an investigation could be regarded as an interested party despite the absence of an explicit decision granting such a status. This could be the case, in particular, if the record of an investigation showed that the investigating authority in fact treated such a producer as an interested party. Having found on the facts that the European Commission had treated the analogue country producer as an interested party, the Appellate Body reversed the Panel's finding that that producer was not an interested party and that therefore Art. 6.1.2 did not apply to evidence provided by that producer. The Appellate Body found, instead, that the European Union violated Article 6.1.2 by not making that evidence available to Chinese producers.
- **ADA Arts. 6.4 and 6.2 (evidence – access):** The Appellate Body agreed with the Panel that the information concerning the list and characteristics of products, provided by the analogue country producer, was relevant to the presentation of the Chinese producers' cases, was not confidential, and was used by the Commission. Therefore by not giving the Chinese producers an opportunity to see that information, the European Union had violated Art. 6.4 and consequently Art. 6.2.

### 3. OTHER ISSUES<sup>2</sup>

- **DSU Art. 21.5 (terms of reference – scope of compliance proceedings):** The Appellate Body agreed with the Panel that China's claims relating to confidential treatment of product list and characteristics provided by the analogue country producer were different from the claims raised during the original proceedings and, therefore, could be raised during the compliance proceedings. The Appellate Body noted in that regard that during the review investigation, the European Commission had released further details of such product characteristics. Hence, China's claims relating to such additional information and its confidential treatment could not have been raised at the original stage of the proceedings.

<sup>1</sup> *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China.*

<sup>2</sup> Other issues addressed: injury determination – definition of domestic industry (ADA Arts. 3.1 and 4.1), disclosure of confidential information – "good cause" (ADA Art. 6.5).