

with the low proportion relied upon by the Commission, makes the definition of the domestic industry inconsistent with Articles 4.1 and 3.1.

5.323. The European Union also seeks reliance on the Appellate Body's findings in *US – Offset Act (Byrd Amendment)* pertaining to the interpretation of Article 5.4 of the Anti-Dumping Agreement.⁶³⁴ We note, however, that Article 5.4 serves a different purpose than Articles 4.1 and 3.1, since Article 5.4 is intended at ensuring that the application for initiation of an anti-dumping investigation is supported by a sufficiently large proportion of domestic producers such that an investigation is warranted. By contrast, the definition of the domestic industry in accordance with Articles 4.1 and 3.1 carries with it both quantitative and qualitative components, since the proportion relied upon should be representative of the domestic industry as a whole and be unbiased, without favouring the interests of any interested party, or group thereof. We therefore do not find it necessary to engage further with the European Union's arguments in this respect.⁶³⁵

5.324. In sum, in order to comply with the recommendations and rulings of the DSB in the original proceedings, the Commission re-defined the domestic industry in the review investigation on the basis of all the domestic producers that had come forward in response to the Notice of Initiation that it had issued in the original investigation. It, therefore, included those 25 producers that had been originally excluded from the definition of the domestic industry because they were not willing to be included in the injury sample.⁶³⁶ The proportion of domestic producers included in the domestic industry definition in the review investigation increased from 27% to 36% of the total domestic production but continues to represent a low proportion of total domestic production. Moreover, the Commission re-defined the domestic industry in the review investigation on the basis of the original Notice of Initiation, which indicated that only those producers that were willing to be included in the injury sample would be considered as cooperating (and therefore eligible for inclusion in the domestic industry definition). In so doing, the Commission continued to rely on a process linking the definition of the domestic industry to the producers' willingness to be included in the injury sample, and the original Notice of Initiation therefore continues to result in a self-selection process among domestic producers that hence introduces a material risk of distorting the domestic industry definition.

5.325. For these reasons, we uphold the Panel's findings, in paragraphs 7.299 and 8.1.v of its Report, that the European Union acted inconsistently with Article 4.1 of the Anti-Dumping Agreement because the Commission defined the domestic industry on the basis of the domestic producers that had come forward in response to the original Notice of Initiation, which stated that only those producers willing to be included in the injury sample would be considered as cooperating; and that a domestic industry definition based on a self-selection process that introduces a material risk of distortion to the investigating authority's injury analysis would necessarily render the resulting injury determination inconsistent with the obligation to make an objective injury analysis based on positive evidence as laid down in Article 3.1 of the Anti-Dumping Agreement. We, therefore, also conclude that the Commission's injury determination, based on the data obtained from a wrongly defined domestic industry, is inconsistent with Article 3.1 of the Anti-Dumping Agreement.

6 FINDINGS AND CONCLUSIONS

6.1. For the reasons set out in this Report, the Appellate Body:

- a. with respect to Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement:
 - i. upholds the Panel's finding, in paragraph 7.34 of the Panel Report, that China's claims under Articles 6.5 and 6.5.1 were within the Panel's terms of reference;

⁶³⁴ European Union's appellant's submission, para. 417.

⁶³⁵ We also recall that, in the original proceedings, the Appellate Body found that the European Union incorrectly presumed that the 25% benchmark in Article 5.4 could be applied to the "major proportion" requirement of Article 4.1. (Appellate Body Report, *EC – Fasteners (China)*, para. 425) We believe that the European Union should not, once again, rely on (albeit different) findings pertaining to Article 5.4 in order to interpret the obligations contained in Articles 4.1 and 3.1.

⁶³⁶ Panel Report, para. 7.283. See also European Union's appellant's submission, para. 419.

- ii. finds that the Panel did not disregard Pooja Forge's request for confidential treatment in its analysis of China's claim under Article 6.5;
 - iii. finds that the Panel did not err in finding that Pooja Forge's request for confidential treatment contained no more than a "bald assertion" on the part of Pooja Forge;
 - iv. finds that the Panel did not err in finding that the Commission did not conduct an objective assessment of whether good cause had been shown by Pooja Forge for the confidential treatment of the information at issue;
 - v. finds that, in the circumstances of this case, the Panel did not err by not conducting its own analysis of the nature of the information at issue for the purposes of its assessment of China's claim under Article 6.5;
 - vi. upholds the Panel's finding, in paragraphs 7.50 and 8.1.i of the Panel Report, that the European Union acted inconsistently with Article 6.5 in the review investigation at issue; and
 - vii. finds that the condition for addressing China's conditional appeal under Article 6.5.1 has not been met and, accordingly, makes no findings under that provision;
- b. with respect to Articles 6.4 and 6.2 of the Anti-Dumping Agreement:
- i. upholds the Panel's finding, in paragraph 7.80 of the Panel Report, that China's claims under Articles 6.4 and 6.2 were within the Panel's terms of reference;
 - ii. finds that the Panel did not err in finding that, for the purposes of its analysis under Article 6.4, the information at issue was not to be regarded as "confidential" because the Commission accorded confidential treatment to that information without assessing whether Pooja Forge had shown "good cause" for such treatment within the meaning of Article 6.5;
 - iii. finds that the Panel did not err in finding that the information at issue was "relevant" to the presentation of the Chinese producers' cases within the meaning of Article 6.4;
 - iv. finds that the Panel did not err in finding that the information at issue was "used" by the Commission in the review investigation within the meaning of Article 6.4;
 - v. finds that the Panel did not err in finding that, as a consequence of the European Union's violation of Article 6.4, the European Union also acted inconsistently with Article 6.2; and
 - vi. upholds the Panel's findings, in paragraphs 7.92, 7.96, and 8.1.ii of the Panel Report, that the European Union acted inconsistently with Articles 6.4 and 6.2 in the review investigation at issue;
- c. with respect to Article 6.1.2 of the Anti-Dumping Agreement:
- i. upholds the Panel's finding, in paragraph 7.115 of the Panel Report, that China's claim under Article 6.1.2 was within the Panel's terms of reference;
 - ii. reverses the Panel's finding that Pooja Forge was not an "interested party" in the review investigation within the meaning of Article 6.11 of the Anti-Dumping Agreement, and finds, instead, that, in the circumstances of this case, Pooja Forge was an "interested party" in the review investigation, and the obligation under Article 6.1.2, therefore, applied to information provided by Pooja Forge; and
 - iii. finds that, because the Commission failed to disclose to the Chinese producers information provided by Pooja Forge concerning the list and characteristics of its

products, the European Union acted inconsistently with Article 6.1.2 in the review investigation;

- d. with respect to Article 2.4 of the Anti-Dumping Agreement:
- i. upholds the Panel's finding, in paragraphs 7.148 and 8.1.iii of the Panel Report, that the European Union acted inconsistently with Article 2.4 because the Commission failed to provide the Chinese producers with certain information regarding the characteristics of Pooja Forge's products that were used in determining normal values;
 - ii. reverses the Panel's findings, in paragraphs 7.223, 7.251, and 8.2.iii of the Panel Report, that the European Union did not act inconsistently with Article 2.4 because the Commission failed to make adjustments for differences in taxation, and finds, instead, that the European Union acted inconsistently with Article 2.4 with respect to differences in taxation;
 - iii. reverses the Panel's findings, in paragraphs 7.250, 7.251, and 8.2.iii of the Panel Report, that the European Union did not act inconsistently with Article 2.4 because the Commission failed to make adjustments for differences relating to access to raw materials, use of self-generated electricity, efficiency in raw material consumption, efficiency in electricity consumption, and productivity per employee, and finds, instead, that the European Union acted inconsistently with Article 2.4 with respect to these differences;
 - iv. upholds the Panel's finding, in paragraph 7.233 of the Panel Report, that China's claim under Article 2.4 in respect of adjustments relating to differences in physical characteristics not reflected in the original PCNs fell within its terms of reference; and
 - v. finds that the condition for addressing China's conditional appeal under Article 2.4 has not been met and, accordingly, makes no findings under that provision with respect to physical characteristics, both reflected and not reflected in the original PCNs;
- e. with respect to Article 2.4.2 of the Anti-Dumping Agreement:
- i. upholds the Panel's findings, in paragraphs 7.276 and 8.1.iv of the Panel Report, that the European Union acted inconsistently with Article 2.4.2 by excluding, in its dumping determinations, models exported by the Chinese producers that did not match any of the models sold by Pooja Forge in India; and
- f. with respect to Articles 4.1 and 3.1 of the Anti-Dumping Agreement:
- i. upholds the Panel's finding, in paragraph 7.291 of the Panel Report, that China's claims under Articles 4.1 and 3.1 with respect to the definition of domestic industry fell within its terms of reference;
 - ii. upholds the Panel's finding, in paragraphs 7.299 and 8.1.v of the Panel Report, that the European Union acted inconsistently with Article 4.1 because the Commission defined the domestic industry on the basis of domestic producers that came forward in response to the original Notice of Initiation, which stated that only those producers willing to be included in the injury sample would be considered as cooperating; and
 - iii. upholds the Panel's consequential findings, in paragraphs 7.299 and 8.1.v of the Panel Report, that the Commission's injury determination, based on the data obtained from a wrongly defined domestic industry, was inconsistent with Article 3.1.

6.2. The Appellate Body recommends that the DSB request the European Union to bring its measures found in this Report, and in the Panel Report as modified by this Report, to be inconsistent with the Anti-Dumping Agreement into conformity with its obligations under that Agreement.

Signed in the original in Geneva this 11th day of December 2015 by:

Ricardo Ramírez-Hernández
Presiding Member

Thomas Graham
Member

Shree B.C. Servansing
Member
