VIII. CONCLUSIONS AND RECOMMENDATION

A. CONCLUSIONS

8.1 Having considered the European Union's preliminary objections, we have made no findings with respect to the following claims, which we have concluded are not within our terms of reference for the reasons set out in the foregoing sections of our Report:

(a) Claim under Article 2.6 of the AD Agreement with respect to the definition of like product;

(b) Claim under Article 6.9 of the AD Agreement with respect to the alleged non-disclosure of aspects of the normal value determination; and

(c) Claim under Article 6.9 of the AD Agreement with respect to the procedural aspects of the domestic industry definition.

8.2 In light of the findings we have set out in the foregoing sections of our Report, we conclude that the European Union acted inconsistently with:

(a) Articles 6.10, 9.2 and 18.4 of the AD Agreement, Article I:1 of the GATT 1994 and Article XVI:4 of the WTO Agreement with respect to Article 9(5) of the Basic AD Regulation;

(b) Articles 6.10 and 9.2 of the AD Agreement with respect to the individual treatment determinations in the fasteners investigation;

(c) Articles 3.1 and 3.2 of the AD Agreement with respect to the consideration of the volume of dumped imports in the fasteners investigation;

(d) Articles 3.1 and 3.5 of the AD Agreement with respect to the causation analysis in the fasteners investigation;

(e) Articles 6.4 and 6.2 of the AD Agreement with respect to aspects of the normal value determination;

(f) Article 6.5.1 of the AD Agreement with respect to non-confidential versions of questionnaire responses of two European producers and Article 6.5 of the AD Agreement with respect to confidential treatment of information in the questionnaire response of the Indian producer;

(g) Article 6.5 of the AD Agreement with respect to the confidential treatment of the Eurostat data on total EU production of fasteners; and

(h) Article 6.5 of the AD Agreement by disclosing confidential information.

8.3 In light of the findings we have set out in the foregoing sections of our Report, we conclude that China has ***not*** established that the European Union acted inconsistently with:

(a) Article 5.4 of the AD Agreement with respect to the standing determination in the fasteners investigation;

(b) Articles 4.1 and 3.1 of the AD Agreement with respect to the definition of domestic industry in the fasteners investigation;

(c) Articles 2.1 and 2.6 of the AD Agreement with respect to the product under consideration in the fasteners investigation;

(d) Article 2.4 of the AD Agreement with respect to the dumping determination in the fasteners investigation;

(e) Articles 3.1 and 3.2 of the AD Agreement with respect to the price undercutting determination in the fasteners investigation;

(f) Articles 3.1, 3.2, 3.4 and 3.5 of the AD Agreement with respect to the consideration of imports from non-sampled/unexamined producers and exporters as dumped in the fasteners investigation;

(g) Articles 3.1 and 3.4 of the AD Agreement with respect to the consideration of the consequent impact of dumped imports on the domestic industry;

(h) Articles 6.5, 6.4 and 6.2 of the AD Agreement in connection with the non-disclosure of the identity of the complainants and the supporters of the complaint;

(i) Articles 6.2 and 6.4 of the AD Agreement with respect to the confidential treatment of the Eurostat data on total EU production of fasteners;

(j) Articles 6.2 and 6.4 of the AD Agreement with respect to the procedural aspects of the domestic industry definition; and

(k) Article 6.1.1 of the AD Agreement with respect to the amount of time provided for responses to requests for information.

8.4 In light of the findings we have set out in paragraph 8.2, we make no findings, based on judicial economy, with respect to China's claims under:

(a) Articles 9.3 and 9.4 of the AD Agreement and Article X:3(a) of the GATT 1994 with respect to Article 9(5) of the Basic AD Regulation,

(b) Article 9.4 of the AD Agreement with respect to the individual treatment determinations in the fasteners investigation;

(c) Articles 3.4 and 3.5 of the AD Agreement with respect to the volume of dumped imports;

(d) Article 6.5.1 of the AD Agreement with respect to the questionnaire response of the Indian producer;

(e) Articles 6.2 and 6.4 of the AD Agreement with respect to the non-confidential versions of questionnaire responses of two European producers and the confidential treatment of information in the questionnaire response of the Indian producer; and

(f) Article 12.2.2 of the AD Agreement with respect to the procedural aspects of the individual treatment determinations.

B. RECOMMENDATION

8.5 Pursuant to Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that to the extent the European Union has acted inconsistently with the provisions of the AD Agreement and GATT 1994, it has nullified or impaired benefits accruing to China under those Agreements. We therefore recommend that the Dispute Settlement Body request the European Union to bring its measure into conformity with its obligations under the AD Agreement and GATT 1994.

8.6 China requests that the Panel use its discretion under the second sentence of Article 19.1 of the DSU by suggesting ways in which the European Union could implement the recommendations and rulings of the DSB. China asserts that, given the "as such" nature of the violation, the first measure should be withdrawn. China further asserts that the nature and scope of the violations of the AD Agreement and of GATT 1994 with respect to the second measure are such that the measure is devoid of any legal basis, and should be withdrawn. Therefore, China requests that the Panel suggest that the European Union implement the recommendations and rulings of the DSB by withdrawing both contested measures.[1131] The European Union does not address China's request in this respect.

8.7 Article 19.1 of the DSU provides:

> "Where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement. In addition to its recommendations, the panel or Appellate Body may suggest ways in which the Member concerned could implement the recommendations". (Footnote omitted.)

Thus, a panel must ("shall") recommend that a Member found to have acted inconsistently with a provision of a covered agreement "bring the measure into conformity", but has discretion to ("may") suggest ways in which a Member could implement that recommendation. Clearly, however, a panel is not required to make a suggestion should it not deem it appropriate to do so.[1132] We also note Article 21.3 of the DSU, which requires Members to inform the DSB regarding implementation of panel and Appellate Body recommendations, providing:

> "At a DSB meeting held within 30 days after the date of adoption of the panel or Appellate Body report, the Member concerned shall inform the DSB of its intentions in respect of implementation of the recommendations and rulings of the DSB". (footnote omitted).

8.8 Most panels reviewing anti-dumping (and countervailing duty) measures have declined requests for suggestions. Where the panel has explained its reasoning, it has generally noted that, in view of the different violations found, while revocation of the measure is a possible means of implementation, other means might also be available.[1133] Several panels, in declining to make a

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[1131] China, first written submission, para. 634.

[1132] The Appellate Body has explained that the second sentence of Article 19.1 "does not oblige panels to make ... a suggestion". Appellate Body Report, *United States – Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico*, ("*US – Anti-Dumping Measures on Oil Country Tubular Goods*"), WT/DS282/AB/R, adopted 28 November 2005, DSR 2005:XX, 10127, para. 189.

[1133] Panel Report, *US – Hot Rolled Steel*, para. 8.11 (panel declined to make specific suggestions, observing that the variety of different violations found might necessitate differing responses in order to bring the measure concerned into conformity with obligations under the AD Agreement); Panel Report, *US – DRAMS*, para. 7.4 (panel declined to make any suggestions on the grounds that there was a range of possible ways through which the United States could appropriately implement the panel's recommendation); Panel Report, *US – Steel Plate*, para. 8.8 (panel saw "no particular need to suggest a means of implementation"); Panel

suggestion, have noted that Article 21.3 of the DSU gives the authority to decide the means of implementation, in the first instance, to the Member found to be in violation.[1134] Many other panels have declined requests for suggestions as well.[1135] In the few cases in which panels have made a suggestion in an anti-dumping dispute, the panels have focussed on the conclusion that one of the violations found concerned initiation, and thus vitiated the entire proceeding, which should never have been initiated, or on the "fundamental and pervasive nature" of the violations, leading the panel to conclude that revocation was the only means of implementation.[1136]

8.9 In this case, although we have found the contested measures inconsistent with the AD Agreement, the GATT 1994 and the WTO Agreement in a number of respects, we do not find it appropriate to make a suggestion with respect to implementation, and therefore deny China's request.

Report, *US – Stainless Steel (Korea)*, para. 7.10 (panel found the determination regarding the margin of dumping inconsistent with the AD Agreement in a number of respects, but observed that it could not say that had the investigating authority acted consistently with the AD Agreement, it would not have found dumping. Noting that while revocation would be one way in which the United States could implement the recommendation to bring its measure into conformity, the panel was not prepared to conclude that it was the only way to do so, and declined to make a suggestion); Panel Report, *US – Line Pipe*, para. 8.6 (panel declined Korea's request for a specific suggestion on ways in which the United States might implement the recommendations, stating that there may be other ways in which the United States could implement its recommendation); Panel Report, *US – Steel Plate*, para. 8.8 (panel indicated that it was "free to suggest ways in which [it believed] the [defendant] could appropriately implement [the panel's] recommendation" but decided not to do so).

[1134] E.g., Panel Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* ("*US – Hot-Rolled Steel*"), WT/DS184/R, adopted 23 August 2001, as modified by Appellate Body Report WT/DS184/AB/R, DSR 2001:X, 4769, para. 8.13. The panel in this dispute observed that the means of implementation is, pursuant to Article 21.3 of the DSU, for the Member concerned, in the first instance.

[1135] Panel Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan* ("*US – Corrosion-Resistant Steel Sunset Review*"), WT/DS244/R, adopted 9 January 2004, as modified by Appellate Body Report WT/DS244/AB/R, DSR 2004:I, 85, para. 8.2; Panel Report, *US – Softwood Lumber V*, para. 8.6; Panel Report, *US – Softwood Lumber VI*, para. 8.8; Panel Report, *Korea – Certain Paper*, para. 9.4; Panel Report, *European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea* ("*EC – Countervailing Measures on DRAM Chips*"), WT/DS299/R, adopted 3 August 2005, DSR 2005:XVIII, 8671, paras. 8.6-8.7; and Panel Report, *United States – Anti-Dumping Measures on Oil Country Tubular Goods (OCTG) from Mexico* ("*US – Anti-Dumping Measures on Oil Country Tubular Goods*"), WT/DS282/R, adopted 28 November 2005, as modified by Appellate Body Report WT/DS282/AB/R, DSR 2005:XXI, 10225, para. 8.18.

[1136] In *Guatemala – Cement I*, the panel concluded that Guatemala had violated the provisions of the AD Agreement by initiating an investigation when there was not sufficient evidence to justify such an initiation under Article 5.3 of the Agreement. With respect to the request for a suggestion on implementation, the panel stated:

> "[T]he entire investigation rested on an insufficient basis, and therefore should never have been conducted. This is, in our view, a violation which cannot be corrected effectively by any actions during the course of the ensuing investigation. Therefore, we suggest that Guatemala revoke the existing anti-dumping measure on imports of Mexican cement, because, in our view, this is the only appropriate means of implementing our recommendation."

Panel Report, *Guatemala – Cement I*, para. 8.6. The second panel to hear the same dispute also suggested revocation of the measure, for similar reasons. Panel Report, *Guatemala – Cement II*, para. 9.7.

In *Argentina – Poultry Anti-Dumping Duties*, the panel concluded that the violations it had found were of a "fundamental nature and pervasive", stated "[i]n light of the nature and extent of the violations in this case, [the panel does] not perceive how Argentina could properly implement [the panel's] recommendation without revoking the anti-dumping measure at issue in this dispute" and suggested that Argentina repeal the measure. Panel Report, *Argentina – Poultry Anti-Dumping Duties*, paras. 8.6-8.7.