

## VIII. CONCLUSION AND RECOMMENDATIONS

### A. CONCLUSIONS

8.1 Having considered the European Union's preliminary objections, we conclude that:

- (a) China's "as such" claims under Articles 6.10, 9.3 and 9.4 of the AD Agreement and X:3(a) of the GATT 1994 against Article 9(5) of the Basic AD Regulation are within our terms of reference;
- (b) China's claim under Article 3.5 of the AD Agreement with respect to the causation analysis in the expiry review is within our terms of reference;
- (c) China's claims under 12.2.2 of the AD Agreement with respect to the adequacy of the explanation of the determinations in the original investigation and expiry review are within our terms of reference;
- (d) China's claim under Article 9.1 of the AD Agreement with respect to the lesser duty determination in the original investigation is within our terms of reference; and
- (e) Article 17.6(i) of the AD Agreement does not impose any obligations on the investigating authorities of WTO Members in anti-dumping investigations that could be the subject of a finding of violation, and we therefore dismiss all of China's claims of violation of Article 17.6(i) of the AD Agreement.

8.2 In light of the findings we have set out in the foregoing sections of our Report, we conclude that China has established 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 "as such";
- (b) Articles 6.10 and 9.2 of the AD Agreement with respect to Article 9(5) of the Basic AD Regulation "as applied" in the original investigation;
- (c) Article 2.2.2(iii) of the AD Agreement with respect to the determination of the amounts for SG&A and profit for Golden Step in the original investigation;
- (d) Article 6.5 of the AD Agreement in connection with the original investigation with respect to:
  - (i) the non-confidential questionnaire response of one sampled EU producer; and
  - (ii) missing declarations of support.
- (e) Article 6.5.1 of the AD Agreement in connection with the original investigation with respect to:
  - (i) the individual production data of domestic producers for the first quarter of 2005;
  - (ii) certain information in the non-confidential questionnaire responses of the sampled EU producers;

- (iii) the non-confidential questionnaire response of one sampled EU producer; and
  - (iv) missing declarations of support.
- (f) Article 6.5 of the AD Agreement in connection with the expiry review with respect to:
- (i) the non-confidential responses to the standing form of four EU producers;
  - (ii) Table C4 of the questionnaire response of Company H; and
  - (iii) certain information in the non-confidential analogue country questionnaire responses of specific producers.
- (g) Article 6.5.1 of the AD Agreement in connection with the expiry review with respect to:
- (i) certain information in the expiry review request;
  - (ii) declarations of support; and
  - (iii) Section B2 of the non-confidential questionnaire response of Company F.

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 6.10.2 of the AD Agreement with respect to the examination of the four Chinese producers who requested individual treatment in the original investigation;
- (b) Articles 2.4 and 6.10.2 of the AD Agreement, Paragraph 15(a)(ii) of China's Accession Protocol, and Paragraphs 151(e) and (f) of China's Accession Working Party Report, with respect to the examination of the non-sampled cooperating Chinese exporting producers' MET applications in the original investigation;
- (c) Article 6.10 of the AD Agreement with respect to the selection of the sample for the dumping determination in the original investigation;
- (d) Article 11.3 of the AD Agreement with respect to the analogue country selection procedure and the selection of Brazil as the analogue country in the expiry review;
- (e) Articles 2.1 and 2.4 of the AD Agreement and Article VI:1 of the GATT 1994 with respect to the analogue country selection procedure and the selection of Brazil as the analogue country in the original investigation;
- (f) Article 11.3 of the AD Agreement with respect to the PCN system used by the Commission in the expiry review;
- (g) Article 2.4 of the AD Agreement and Article VI:1 of the GATT 1994 with respect to the PCN system used and the adjustment for leather quality made by the Commission in the original investigation;

- (h) Article 2.6 of the AD Agreement, read together with Articles 3.1 and 4.1 of the AD Agreement, with respect to the Special Technology Athletic Footwear (STAF) in the original investigation;
- (i) Articles 3.1 and 6.10 of the AD Agreement and Article VI:1 of the GATT 1994 with respect to the procedure for sample selection and the selection of the sample for the injury analysis in the original investigation and the expiry review;
- (j) Article 11.3 of the AD Agreement with respect to the procedure for sample selection and the selection of the sample for the injury determination in the expiry review;
- (k) Article 3.3 of the AD Agreement with respect to the determination to undertake a cumulative assessment in the original investigation;
- (l) Article 11.3 of the AD Agreement with respect to the finding of likelihood of continuation or recurrence of injury in the expiry review;
- (m) Articles 3.4, 3.1 and 3.2 of the AD Agreement with respect to the evaluation of injury indicators in the original investigation;
- (n) Articles 3.5 and 3.1 of the AD Agreement with respect to the causation determination in the original investigation;
- (o) Article 6.1.1 of the AD Agreement and Paragraph 15(a) of China's Accession Protocol with respect to the MET/IT claim forms in the original investigation;
- (p) Article 6.1.2 of the AD Agreement with respect to the non-confidential injury and Union Interest questionnaires responses of certain sampled EU producers in the expiry review;
- (q) Article 6.4 of the AD Agreement, and as consequence or independently, Article 6.2 of the AD Agreement, with respect to certain information in the original investigation and expiry review;
- (r) Article 6.5 of the AD Agreement, and as a consequence or independently, Article 6.2 of the AD Agreement, in connection with the original investigation with respect to:
  - (i) the names of the complainants, supporters, sampled EU producers, and all known producers;
  - (ii) the methodology and data used for the selection of the sample of EU producers;
  - (iii) adjustments for differences affecting price comparability;
  - (iv) certain information in the complaint;
  - (v) certain information in the Note for the File dated 6 July 2005; and
  - (vi) certain information in the non-confidential questionnaire responses of the sampled EU producers;

- (s) Article 6.5.1 of the AD Agreement, and as a consequence or independently, Article 6.2 of the AD Agreement, in connection with the original investigation with respect to:
  - (i) certain information in the complaint;
  - (ii) certain information in the Note for the File dated 6 July 2005; and
  - (iii) certain information in the non-confidential questionnaire responses of the sampled EU producers;
- (t) Article 6.5.2 of the AD Agreement, and as a consequence, Article 6.2 of the AD Agreement, in connection with the original investigation with respect to certain information in the non-confidential questionnaire responses of the sampled EU producers;
- (u) Article 6.5 in connection with the expiry review with respect to:
  - (i) the names of the complainants, supporters, sampled EU producers in the review, and sampled EU producers in the original investigation that completed the Union Interest questionnaire in the review;
  - (ii) certain information in the expiry review request and CEC submissions;
  - (iii) certain information in the non-confidential questionnaire responses of the sampled EU producers;
  - (iv) the non-confidential Union Interest questionnaire responses of certain EU producers;
  - (v) certain information in the declarations of support; and
  - (vi) certain information in the non-confidential analogue country questionnaire responses of specific producers;
- (v) Article 6.5.1 of the AD Agreement in connection with the expiry review with respect to:
  - (i) certain information in the non-confidential questionnaire responses of the sampled EU producers;
  - (ii) certain information in the expiry review request and CEC submissions;
  - (iii) the non-confidential Union Interest questionnaire responses of certain EU producers; and
  - (iv) certain information in the non-confidential analogue country questionnaire responses of specific producers;
- (w) Article 6.5.2 of the AD Agreement in connection with the expiry review with respect to:

- (i) the names of the complainants, supporters, sampled EU producers in the review, and sampled EU producers in the original investigation that completed the Union Interest questionnaire in the review; and
  - (ii) certain information in the non-confidential questionnaire responses of the sampled EU producers;
- (x) Article 6.2 of the AD Agreement in connection with the expiry review with respect to:
- (i) the names of the complainants, supporters, sampled EU producers in the review, and sampled EU producers in the original investigation that completed the Union Interest questionnaire in the review; and
  - (ii) certain information in the non-confidential questionnaire responses of the sampled EU producers.
- (y) Articles 3.1 and 6.8 of the AD Agreement with respect to the failure to apply facts available in the expiry review;
- (z) Article 6.9 of the AD Agreement with respect to the time provided for submission of comments on the Additional Final Disclosure in the original investigation;
- (aa) Article 12.2.2 of the AD Agreement in connection with the information and explanations provided in respect of specific issues in the original investigation and expiry review; and
- (bb) Articles 3.1, 3.2, 9.1 and 9.2 of the AD Agreement with respect to the imposition and collection of anti-dumping duties in the original investigation;

8.4 In light of the findings we have set out in paragraphs 8.2 and 8.3 above, 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 "as such";
- (b) Article 9.3 of the AD Agreement with respect to Article 9(5) of the Basic AD Regulation "as applied" in the original investigation;
- (c) Article 6.2 of the AD Agreement with respect to the questionnaire response of one sampled EU producer, missing declarations of support, and certain information in the non-confidential questionnaire responses of the sampled EU producers, in the original investigation;
- (d) Article 6.2 of the AD Agreement with respect to the non-confidential responses to the standing form of four EU producers and with respect to Table C4 of the questionnaire response of the sampled EU producer (Company H), in the expiry review;
- (e) Article 6.5.1 of the AD Agreement with respect to certain information the non-confidential analogue country questionnaire responses of specific producers in the expiry review; and

- (f) Articles 1 and 18.1 of the AD Agreement with respect to the original investigation and the expiry review.

B. RECOMMENDATION

8.5 Under 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 that the European Union has acted inconsistently with certain provisions of the AD and WTO Agreements and the GATT 1994, it has nullified or impaired benefits accruing to China under these agreements.

8.6 On 28 March 2011, the European Union informed the Panel that, as of 31 March 2011, the anti-dumping measures on certain footwear from China at issue in this dispute would be terminated, and requested that the Panel refrain from making any recommendation pursuant to the first sentence of Article 19.1 of the DSU with respect to the expired measures.<sup>1785</sup> China did not dispute that the anti-dumping measures would expire as indicated by the European Union. However, China opposes the European Union's request that the Panel refrain from making a recommendation, noting that Article 19.1 of the DSU provides that "[w]here 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."<sup>1786</sup> In addition, China notes the overall function of panels as set out in Article 11 of the DSU. China also takes note of the fact that the Notice of Expiry indicates that the Commission considered it "appropriate to monitor for one year the evolution of the imports of footwear" from China, and asserts that this is a "highly exceptional measure which effectively prolongs certain effects of the challenged measures beyond the period of application of anti-dumping duties". China asserts that it "maintains a legal interest in obtaining findings from the Panel, [and] also to have a *recommendation* from the Panel, in order to avoid a repetition of the lapsed measures in future and to obtain removal of the monitoring of the imports of footwear."<sup>1787</sup> China further recalls that the other measure at issue in this dispute, Article 9(5) of the European Union's Basic AD Regulation, remains in force, and that it has requested the Panel to suggest that "the European Union ... refund the anti-dumping duties paid thus far on imports of the product concerned from China."<sup>1788</sup>

8.7 There is no dispute that two of the measures at issue in this dispute, the Review and Definitive Regulations, expired as of 31 March 2011. In this situation, we conclude that there is no basis for a recommendation to "bring the [expired] measure into conformity" under Article 19.1 of the DSU. We note that the Appellate Body and panels have taken this approach in a number of reports.<sup>1789</sup> Indeed, in one case, the Appellate Body specifically criticized a panel for making a

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<sup>1785</sup> European Union, letter dated 28 March 2011, page 1, referring to Notice of the expiry of certain anti-dumping measures, *Official Journal of the European Union* C 82/4, of 16 March 2011, citing Panel Report, *Dominican Republic – Measures Affecting the Importation and Internal Sale of Cigarettes* ("Dominican Republic – Import and Sale of Cigarettes"), WT/DS302/R, adopted 19 May 2005, as modified by Appellate Body Report WT/DS302/AB/R, DSR 2005:XV, 7425, paras. 7.363, 7.393 and 7.419; and Appellate Body Report, *United States – Import Measures on Certain Products from the European Communities* ("US – Certain EC Products"), WT/DS165/AB/R, adopted 10 January 2001, DSR 2001:I, 373, paras. 81 and 129.

<sup>1786</sup> China, letter dated 30 March 2011, page 1 (footnotes omitted, emphasis added by China).

<sup>1787</sup> China, letter dated 30 March 2011, page 2 (emphasis in original). In this regard, China asserts that if the Panel were to rule that the measures were inconsistent with the European Union's obligations, the European Union would "necessarily also have to immediately stop monitoring imports of footwear pursuant to the [Notice of expiry]". *Id.*, footnote 4.

<sup>1788</sup> China, letter dated 30 March 2011, page 3.

<sup>1789</sup> Appellate Body Reports, *European Communities – Regime for the Importation, Sale and Distribution of Bananas – Second Recourse to Article 21.5 of the DSU by Ecuador*, WT/DS27/AB/RW2/ECU, adopted 11 December 2008, and Corr.1 / *European Communities – Regime for the Importation, Sale and*

recommendation with respect to a measure that panel had concluded was no longer in existence, and the Appellate Body itself declined to make a recommendation in that case.<sup>1790</sup> We do not agree with China's view that the monitoring of imports of footwear from China by the Commission "prolongs certain effects" of the expired measures. If anything, such monitoring is a distinct measure, which, if a Member believes it to be inconsistent with a provision of the AD Agreement or another covered Agreement, may be the subject of a new dispute. However, this monitoring does not in our view suffice to establish that we could, or should, make a recommendation with respect to the expired measures. The fact that China requested the Panel to make a suggestion under the second sentence of Article 19.1 does not affect our conclusion. First, as discussed further below, it is clear that the making of a suggestion is at the discretion of a panel. Moreover, at least one panel has ruled that, where it makes no recommendation to the DSB on a claim in dispute, it cannot make any suggestion under Article 19.1.<sup>1791</sup> We take the same approach in this case.

8.8 As a consequence, the only measure as to which we make a recommendation is Article 9(5) of the Basic AD Regulation. Pursuant to Article 19.1 of the DSU, having found that the European Union acted inconsistently with provisions of the AD and WTO Agreements and the GATT 1994 as set out above, we recommend that the European Union bring this measure into conformity with its obligations under those Agreements.

8.9 China requests that the Panel recommend that the DSB request the European Union to withdraw Article 9(5) of the Basic AD Regulation.

8.10 Article 19.1 of the DSU provides:

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*Distribution of Bananas – Recourse to Article 21.5 of the DSU by the United States ("EC – Bananas III (Article 21.5 – Ecuador II) / EC – Bananas III (Article 21.5 – US)"), WT/DS27/AB/RW/USA and Corr.1, adopted 22 December 2008, para. 479, ("As the measure at issue in this dispute is no longer in existence, we do not make any recommendation to the DSB pursuant to Article 19.1 of the DSU"); Panel Report, Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines ("Thailand – Cigarettes (Philippines)"), WT/DS371/R, circulated to WTO Members 15 November 2010 [appeal in progress], para. 8.8 ("We do not make a recommendation for the December 2005 MRSP Notice as it is not disputed that it has expired and does not continue to exist for purpose of Article 19.1 of the DSU."); Panel Report, United States – Certain Measures Affecting Imports of Poultry from China ("US – Poultry (China)"), WT/DS392/R, adopted 25 October 2010, para. 8.7 ("given that the measure at issue, Section 727 has expired, we do not recommend that the DSB request the United States to bring the relevant measure into conformity with its obligations under the SPS Agreement and the GATT 1994.")*

<sup>1790</sup> Appellate Body Report, *US – Certain EC Products*, paras. 80-81 and 129 ("the Panel, on the one hand, found that "the 3 March Measure is no longer in existence" and, on the other hand, recommended "that the Dispute Settlement Body request the United States to bring its measure into conformity with its obligations under the WTO Agreement." ... there is an obvious inconsistency between the finding of the Panel that "the 3 March Measure is no longer in existence" and the subsequent recommendation of the Panel that the DSB request that the United States bring its 3 March Measure into conformity with its WTO obligations. **The Panel erred in recommending that the DSB request the United States to bring into conformity with its WTO obligations a measure which the Panel has found no longer exists.** ... As we have upheld the Panel's finding that the 3 March Measure, the measure at issue in this dispute, is no longer in existence, we do not make any recommendation to the DSB pursuant to Article 19.1 of the DSU.") (emphasis added).

<sup>1791</sup> Panel Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico ("US – Stainless Steel (Mexico)"), WT/DS344/R, adopted 20 May 2008, as modified by Appellate Body Report WT/DS344/AB/R, DSR 2008:II, 599, para. 8.5 ("We note that by virtue of Article 19.1 of the DSU, a panel has discretion to ("may") suggest ways in which a Member could implement the recommendation that the Member concerned bring the measure into conformity with the covered agreement in question. Having made no recommendations to the DSB on Mexico's claims with respect to which Mexico seeks a suggestion, however, we cannot, and do not, make any suggestion under Article 19.1 of the DSU in these proceedings.")*.

"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)

Pursuant to Article 19.1, a panel "shall" recommend that a Member found to have acted inconsistently with a provision of a covered agreement "bring the measure into conformity" and "may" suggest ways in which a Member could implement that recommendation. Thus, a panel is not required to make a suggestion should it not deem it appropriate to do so.<sup>1792</sup>

8.11 We also note that Article 21.3 of the DSU, which requires Members to inform the DSB regarding implementation of panel and Appellate Body recommendations, provides:

"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).

8.12 Previous panels have emphasized 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.<sup>1793</sup> In this case, although we have found the contested measure inconsistent with the AD and WTO Agreements and the GATT 1994 in a number of respects, we do not find it appropriate to make a suggestion with respect to implementation of our recommendation, and we therefore deny China's request in this respect.

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<sup>1792</sup> Appellate Body Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, para. 189.

<sup>1793</sup> E.g. Panel Reports, *EC – Fasteners (China)*, para. 8.8; and *US – Hot-Rolled Steel*, para. 8.13.