

6 FINDINGS AND CONCLUSIONS

6.1. For the reasons set out in this Report, the Appellate Body makes the following findings and conclusions.

6.1 Definition of domestic industry

6.2. Article 4.1 of the Anti-Dumping Agreement provides that the "domestic industry" is composed of domestic producers of the like product. If an investigating authority were permitted to leave out, from the definition of domestic industry, domestic producers of the like product that provided, in the authority's view, *allegedly* deficient information, a material risk of distortion would arise in the injury analysis. This is because the non-inclusion of those producers could make the definition of the domestic industry no longer representative of total domestic production. We do not consider that Article 3.1 of the Anti-Dumping Agreement allows investigating authorities to leave domestic producers of the like product out of the definition of domestic industry because of *alleged* deficiencies in the information submitted by those producers. The Anti-Dumping Agreement, in particular Article 6, sets out tools to address the inaccuracy and incompleteness of information. Thus, in our view, the Panel's interpretation of Article 4.1 does not create a conflict between the obligations in Article 3.1 and Article 4.1 of the Anti-Dumping Agreement. We also do not read the Panel's interpretation of Article 4.1 as having reduced the term "major proportion" to inutility. Moreover, we do not consider that Articles 3.1 and 4.1 prevent an investigating authority from initially examining the information submitted by domestic producers before defining the domestic industry to the extent that the information collected is pertinent to defining the domestic industry. We do not consider that the Panel reached its finding solely on the basis of the fact that the DIMD reviewed the information submitted by Sollers and GAZ before defining the domestic industry. In light of the specific circumstances of this case, we find no reversible error in the Panel's interpretation and application of Articles 4.1 and 3.1 of the Anti-Dumping Agreement.

- a. We therefore find that the Panel did not err in its interpretation and application of Articles 3.1 and 4.1 of the Anti-Dumping Agreement in finding that the DIMD acted inconsistently with these provisions in its definition of "domestic industry".
- b. Consequently, we uphold the Panel's findings in paragraphs 8.1.a and 8.1.b of the Panel Report.

6.2 Price suppression

6.3. In relation to Russia's appeal under Articles 3.1 and 3.2 of the Anti-Dumping Agreement, the fact that several factors or elements could potentially influence the rate of return used to construct the target domestic price does not allow an investigating authority to disregard evidence regarding any particular factor or element that calls into question the explanatory force of dumped imports for significant price suppression under Article 3.2 of the Anti-Dumping Agreement. We thus disagree with Russia's argument that the consideration of evidence regarding factors or elements – such as, in this dispute, the financial crisis – that call into question the explanatory force of dumped imports for the existence of price suppression would lead to a biased analysis simply because there could be other factors that could also potentially affect the selected rate of return. In addition, we do not consider that the Panel's interpretation of Article 3.2 suggests that an investigating authority is required to conduct a non-attribution analysis of all known factors that may be causing *injury* to the domestic industry in the context of its price suppression analysis. The inquiries under Article 3.5 and under Article 3.2 of the Anti-Dumping Agreement have distinct focuses. The analysis under Article 3.5 focuses on the causal relationship between dumped imports and *injury* to the domestic industry. In contrast, the analysis under Article 3.2 focuses on the relationship between dumped imports and *domestic prices*.

- a. We therefore find that the Panel did not err in its interpretation and application of Articles 3.1 and 3.2 of the Anti-Dumping Agreement by finding that the DIMD acted inconsistently with these provisions because it failed to take into account the impact of the financial crisis in determining the rate of return used to construct the target domestic price for its price suppression analysis.

- b. Consequently, we uphold the Panel's findings in paragraphs 7.64-7.67 and 8.1.d.i of the Panel Report.⁵⁵⁸

6.4. In relation to the European Union's claims under Article 11 of the DSU, we consider that the Panel's findings concerning the DIMD's methodology, the long-term price trends, and the degree of price suppression are not coherent and consistent with the Panel's earlier finding that the manner in which the DIMD used the 2009 rate of return to determine the target domestic price was WTO-inconsistent.

- a. We therefore find that the Panel acted inconsistently with its obligations under Article 11 of the DSU.
- b. Consequently, we reverse the Panel's findings in paragraphs 7.77-7.81, 7.104-7.107, 8.1.d.iii, and 8.1.d.iv of the Panel Report.

6.5. Having found that the Panel acted inconsistently with its obligations under Article 11 of the DSU, we do not examine the European Union's conditional claim that the Panel erred in its interpretation and application of Articles 3.1 and 3.2 of the Anti-Dumping Agreement in finding that the DIMD's methodology explained that the effect of the dumped imports was to suppress domestic prices. We also do not examine the European Union's request for us to complete the analysis and find that the DIMD acted inconsistently with Articles 3.1 and 3.2 by failing to consider whether the dumped imports have explanatory force for the existence of significant price suppression.

6.6. In relation to the European Union's claim under Articles 3.1 and 3.2 of the Anti-Dumping Agreement concerning whether the domestic market could absorb further price increases, we consider that an investigating authority must ensure that its price suppression methodology under Article 3.2 assesses price increases "which otherwise would have occurred" in the absence of dumped imports. In addition, an investigating authority is required to consider whether dumped imports have "explanatory force" for the occurrence of significant suppression of domestic prices. Contrary to the European Union's contention, we do not read the Panel to have added a requirement to Articles 3.1 and 3.2 that interested parties must have explicitly questioned the ability of the market to absorb additional price increases for an investigating authority to be required to consider this question. Thus, in this respect, we do not find that the Panel erred in its interpretation of Articles 3.1 and 3.2 of the Anti-Dumping Agreement. We fault the Panel, however, for having itself undertaken the assessment of relevant evidence on the DIMD's investigation record.

- a. For these reasons, we find that the Panel erred in its application of Articles 3.1 and 3.2 of the Anti-Dumping Agreement in finding that the evidence on the investigation record did not require the DIMD to examine whether the market could absorb further price increases.
- b. Consequently, we reverse the Panel's findings in paragraphs 7.87-7.91 and 8.1.d.iii of the Panel Report.
- c. Having reversed the Panel's finding at issue, we complete the analysis and find that the DIMD acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement by failing to examine evidence relevant to whether the market would accept additional domestic price increases.

6.3 Confidential investigation report

6.7. In relation to Russia's contention that, on appeal, the European Union misrepresents the arguments it made before the Panel, we consider that, before the Panel, the European Union raised the issue of whether certain parts of the confidential investigation report formed part of the

⁵⁵⁸ Having upheld these Panel findings, we do not examine Russia's conditional request concerning paragraphs 7.181-7.182 and 8.1.f.i of the Panel Report regarding the consequential inconsistency with Articles 3.1 and 3.5 of the Anti-Dumping Agreement.

investigation record at the time the final determination to impose the anti-dumping measure was made. On appeal, the European Union faults the Panel for not having engaged with that same argument.

6.8. We recall that the confidential investigation report was submitted by Russia together with its first written submission to the Panel and that the European Union could not have been aware of the contents of the confidential investigation report before the receipt of Russia's first written submission. We note the difficulty the European Union had in the present case in obtaining and providing evidence to the Panel in support of its contention that the relevant parts of the confidential investigation report may not have formed part of the investigation record. In our view, when faced with a claim that a report, or parts of it, on the basis of which an anti-dumping measure was imposed did not form part of the investigation record, a panel has to take certain steps to assess objectively and assure itself of the validity of such report, or its parts, and whether or not it formed part of the contemporaneous written record of the investigation. In the present dispute, the Panel did not seek to assure itself that the relevant parts of the confidential investigation report formed part of the investigation record at the time the determination to impose the anti-dumping measure was made.

- a. On the basis of the above, we find that the Panel acted inconsistently with Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement by relying, in its examination of the European Union's claims under Articles 3.1 and 3.4 of the Anti-Dumping Agreement, on the confidential investigation report without properly assuring itself of its validity, that is to say, of whether the relevant parts of it formed part of the investigation record at the time the determination to impose the anti-dumping measure was made.
- b. Consequently, we reverse the Panel's intermediate finding, in paragraphs 7.165 and 7.166 of the Panel Report, that it could base its analysis of the European Union's claims concerning the three injury factors under Articles 3.1 and 3.4 of the Anti-Dumping Agreement on the confidential investigation report.
- c. We also reverse the Panel's subsequent analysis, contained in paragraphs 7.166 to 7.171, and the Panel's ultimate finding, in paragraphs 7.172, 7.173.i, and 8.1.e.x of the Panel Report, that the European Union had failed to establish that the DIMD acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement by failing to examine the three injury factors at issue, namely: (i) the domestic industry's return on investments; (ii) the actual and potential effects on cash flow; and (iii) the ability to raise capital or investments.

6.9. In relation to the European Union's request for completion of the analysis, in light of the absence on the Panel record of a discernible attempt by the Panel to assure itself of whether certain parts of the confidential investigation report formed part of the investigation record at the time the determination to impose the anti-dumping measure was made, we are not in a position to decide whether these parts of the confidential investigation report formed part of the investigation record at the time the determination was made. Accordingly, we cannot determine whether we can rely on the confidential investigation report in the assessment of the European Union's claims under Articles 3.1 and 3.4 of the Anti-Dumping Agreement. In these circumstances, we cannot complete the analysis on the basis of the non-confidential investigation report as requested by the European Union.

6.4 Related dealer

6.10. In relation to the European Union's claim that the Panel erred in its interpretation and application of Articles 3.1 and 3.4 of the Anti-Dumping Agreement by finding that the DIMD was not required to evaluate the inventory information of Turin Auto in examining injury to the domestic industry, we consider that the Panel's interpretation, which is more nuanced than the European Union's arguments on appeal suggest, comports with the text of Articles 3.1 and 3.4 specifying that the injury analysis concerns all relevant factors and indices having a bearing on the state of the domestic industry. In our view, evidence concerning a related dealer that does not produce the like product and is thus not included in the "domestic industry" may be pertinent, in a particular case, to the evaluation of a relevant economic factor or index having a bearing on the

state of the domestic industry. We agree with the Panel that whether an evaluation under Article 3.4 requires a consideration of such evidence can be assessed only on a case-by-case basis. We do not consider the degree of proximity in the relationship between different entities to be dispositive, without more, of whether evidence relating to the inventory of a related dealer is pertinent to the evaluation of "inventories" for purposes of the injury analysis under Article 3.4. With respect to the application of Articles 3.1 and 3.4 to the anti-dumping investigation at issue, we find that the European Union does not have a separate and independent basis for its claim that the Panel erred in applying these provisions when analysing the injury factor "inventories" in its assessment of the state of Sollers. We agree with the Panel's finding that the European Union had not established that the DIMD acted inconsistently with Articles 3.1 and 3.4 by not considering the inventories data of Turin Auto in the investigation report.

- a. We therefore find that the Panel did not err in its interpretation and application of Articles 3.1 and 3.4 of the Anti-Dumping Agreement.
- b. Consequently, we uphold the Panel's finding, in paragraphs 7.122, 7.123, 7.173.b, and 8.1.e.ii of the Panel Report, that the European Union had not established that the DIMD acted inconsistently with these provisions in its injury analysis by not examining inventory information of a dealer related to a domestic producer of the like product, but not itself part of the domestic industry.

6.5 Essential facts

6.11. In relation to Russia's appeal, we note that an inconsistency under Article 6.5 of the Anti-Dumping Agreement with respect to the confidential treatment of information that constitutes essential facts may not be presumed to result in an inconsistency with the requirements that apply to essential facts under Article 6.9 of the Anti-Dumping Agreement. The inquiry under Article 6.9 is separate and distinct from the assessment under Article 6.5 of the Anti-Dumping Agreement. Regardless of whether or not the essential facts at issue were properly treated as confidential under Article 6.5, a panel must examine whether any disclosure made – including those made through non-confidential summaries under Article 6.5.1 of the Anti-Dumping Agreement – meets the legal standard under Article 6.9.

- a. We find that the Panel erred in its interpretation of Article 6.9 of the Anti-Dumping Agreement by considering that, where essential facts are not properly treated as confidential in accordance with Article 6.5, this automatically leads to an inconsistency with Article 6.9. We also find that the Panel erred in finding, in paragraph 7.269 of the Panel Report, that, "to the extent that the DIMD failed to disclose information that was not properly treated as confidential ..., it acted inconsistently with Article 6.9."⁵⁵⁹ In addition, with respect to the information from the electronic customs database, we find that the Panel erred in finding, in paragraph 7.270 of the Panel Report, that, "[t]o the extent that the DIMD failed to disclose information that was not properly treated as confidential, it acted inconsistently with Article 6.9" of the Anti-Dumping Agreement.⁵⁶⁰
- b. Consequently, we reverse the Panel's findings, in paragraph 7.268, as read in light of paragraph 7.269, and in paragraphs 7.269, 7.270, and 7.278, Table 12, as well as the Panel's conclusion, in paragraph 8.1.h.ii of the Panel Report, that the DIMD acted inconsistently with Article 6.9 of the Anti-Dumping Agreement by failing to inform all interested parties of the information listed in items (d) to (o) of Table 12.

6.12. In relation to the European Union's request that we complete the analysis and find that the DIMD acted inconsistently with Article 6.9 of the Anti-Dumping Agreement, having examined the draft investigation report, we find that the DIMD acted inconsistently with Article 6.9 by failing to disclose the essential facts contained in items (d) and (f) to (o) of Table 12 in paragraph 7.278 of the Panel Report.

6.13. In relation to the European Union's appeal, we consider that not all methodologies used by an investigating authority in a particular investigation can constitute essential facts within the

⁵⁵⁹ Panel Report, para. 7.269.

⁵⁶⁰ Panel Report, para. 7.270.

meaning of Article 6.9 of the Anti-Dumping Agreement. Rather, only those methodologies the knowledge of which is necessary for the participants to understand the basis of the investigating authority's decision and to defend their interests may be essential facts under Article 6.9 of the Anti-Dumping Agreement. An assessment of whether a particular methodology constitutes an essential fact should therefore be made on a case-by-case basis. Moreover, in certain circumstances, knowledge of the data itself may not be sufficient to enable an interested party to properly defend itself, unless that party is also informed of the source of such data and how it was used by the investigating authority. In particular, knowing the source of information may enable a party to comment on the accuracy or reliability of the relevant information and allow it to propose alternative sources of that information. This may be particularly important in the circumstances where the investigating authority uses data that was not submitted by an interested party, but obtained from other sources (e.g. from a customs or statistical database). Thus, in certain circumstances, the source of the data may be an essential fact under Article 6.9 of the Anti-Dumping Agreement.

- a. We therefore find that the Panel erred in its interpretation of Article 6.9 of the Anti-Dumping Agreement concerning whether methodologies and sources of information may qualify as essential facts, as set out in paragraphs 7.256.a and 7.257.a of the Panel Report. We also find that the Panel erred in the subsequent application of its general understanding that sources of information do not constitute essential facts to the specifics of this case, as set out in paragraph 7.257.a and b of the Panel Report.
- b. Consequently, we reverse the Panel's findings, in paragraphs 7.256.a and 7.257.a and b, and the Panel's conclusions, in paragraphs 7.278, Table 12, items (a) and (b), and 8.1.h.i of the Panel Report, as they relate to items (a) and (b) of Table 12.

6.14. In relation to the European Union's request that we complete the analysis and find that, by failing to disclose the source of information concerning import volumes and values, the DIMD acted inconsistently with Article 6.9 of the Anti-Dumping Agreement, we do not consider that there are sufficient factual findings by the Panel and uncontested evidence on the Panel record that would allow us to complete the analysis.

6.6 Recommendation

6.15. The Appellate Body recommends that the DSB request Russia 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 and the GATT 1994 into conformity with those Agreements.

Signed in the original in Geneva this 26th day of January 2018 by:

Hong Zhao
Presiding Member

Shree Baboo Chekitan Servansing
Member

Ujal Singh Bhatia
Member
