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China – Definitive Anti-Dumping Duties on X-Ray Security Inspection Equipment from the European Union (WTDS425R)

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ABSTRACT

Dumping has been recognized as the policy that has to be condemned. It has been referred by the economists, 'as price discrimination between national markets', a definition first proposed by Viner. The much needed legal framework and legally acceptable definition has been provided by GATT 1994. Article VI of GATT 1994 condemns dumping in express terms, '[T]he contracting party recognize that dumping, by which products of one country are introduced into the commerce of other country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry.'. Under GATT rules, a product is considered to be dumped if its export price was lower than its normal value.

I. INTRODUCTION

Dumping has been recognized as the policy that has to be condemned.[2]It has been referred by the economists, 'as price discrimination between national markets', a definition first proposed by Viner.[3] The much needed legal framework and legally acceptable definition has been provided by GATT 1994. Article VI of GATT 1994 condemns dumping in express terms, *'[T]he contracting party recognize that dumping, by which products of one country are introduced into the commerce of other country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry...*'. Under GATT rules, a product is considered to be dumped if its export price was lower than its normal value.

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[2] John H. Jackson, *The World Trading System, law and policy of International Relations*, Second Ed 2012, MIT Press

[3] Robinson, *Economics of Imperfect Competition*, (London, 1933)P.180

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In order to establish the dumping the investigating authority must provide reasoned establishment of determination. In order to impose anti dumping duties there must be free and fair investigation. Such an investigation must not be in contradiction to the minimum procedural requirements prescribed under the Agreement of Antidumping. Any deviation from the prescribed standard should be justified by the investigating authority. Burden lies on the investigating authority to establish that they have followed the procedural requirements based on the firm substantive grounds. In case of violation of the procedural requirements it would be the violation of the fair and equitable treatment along with the denial of the legitimate expectation of the exporter. The duties should not be imposed arbitrarily, if so happens it's a violation of the antidumping agreement and is a fit case to be challenged before the Dispute Settlement Body of WTO. This instant case deals with violation of minimum procedural standards along with arbitrary imposition of anti-dumping duties on the X-ray equipments exported to China. The present paper is divided into five sections of which Section I provides the details of the claimant and respondent along with the third parties, Section II provides the factual background of the case, Section III deals with the claims of the parties, Section V deals with the substantive claims,Section V deals with the Procedural claims Section VI provides brief conclusion.

II. PARTIES

Parties:

Complainant	**European Union**
Respondent	**China**
Third Parties	**Chile, India, Japan, Norway, Thailand and United States of America**

III. FACTS: BACKGROUND

The instant case deals with the imposition of antidumping duties on x-ray security inspection equipment from the European Union (EU) by China. Ministry of Commerce of the People's Republic of China (MOFCOM) circulated Notice No. 1 (2011), including its annexure stating imposition of definitve antidumping duties on x-ray security inspection equipment from the European Union (EU).

The Chinese producer Nuctech Company Limited (Nuctech) filed an application for the imposition of anti-dumping measures on x-ray security inspection scanners from the EU in August 2009. Eventually, as per the procedure MOFCOM issued a notice of initiation of an anti-dumping investigation. MOFCOM fixed a 12-month Period of Investigation (POI) for dumping analysis starting from 1 January 2006 to 31 December 2008. Smiths Heimann GmbH and Smiths Heimann SAS were the two exporters who notified the MOFCOM their cooperation during the investigation along with the European Commission. But Smiths Heimann GmbH and the European Commission were the only participants in MOFCOM's investigation. As required MOFCOM issued a questionnaire to both the domestic manufactures as well as to the foreign manufactures. Such questionnaires contained the required questions by MOFCOM to establish the dumping. Smiths Heimann GmbH (hereinafter Smiths) filed its responses to the dumping and injury questionnaires on 30 December 2009 and Nuctech submitted its response to the domestic manufacturers' questionnaire on 19 December 2009. No other exporter, producer or importer filed any questionnaire responses. On 9 June 2010, MOFCOM published a preliminary determination of dumping and injury. It also imposed provisional AD duties on the subject products. On 29 June 2010, Smiths submitted its comments on MOFCOM's preliminary determination and the European Commission submitted its comments on 25 June 2010.

Later on, MOFCOM published its final report stating the final determination of dumping and injury on 23rd January 2011. The final determination imposed 33.5% anti-dumping duty on imports of x-ray scanners produced by Smiths and a residual rate 71.8% on imports of x-ray scanners from other sources in the EU.

IV. CLAIMS OF THE PARTIES

The instant case is based on both substantive aswell the procedural claims under antidumping agreement. The claims at WTO panel can be summarized under above mentioned two aspects.

III.a. Substantive claims based on Article 3 of Anti Dumping Agreement.

i. **Price effect Analysis**.

First claim was on the non establishment of the likeness of product under determination. EC claimed that MOFCOM's *price effects analysis* is inconsistent under Articles 3.1 and 3.2 of the Antidumping Agreement because it is not an objective examination based on positive evidence. EC further claimed that MOFCOM did not take into account the considerable

differences between the products covered by the investigation in particular between the high-energy and low energy scanners.

ii. Injury to the Domestic Industry

In its second claim EC stated that MOFCOM examination erred on the impact of the dumped imports on the domestic industry is not based upon "positive evidence" since it did not consider "all relevant economic factors and indices" having a bearing on the state of industry. MOFCOM did not properly evaluate the interaction between the "positive" and "negative" economic factors and indices and consider them in a proper context. Hence, MOFCOM violated Article 3.1 and 3.4 of the AD Agreement.

iii. Causality

In its third claim EC claimed that the price effects methodology employed by China under Article 3.2 invalidates MOFCOM's causation findings as the price effect analysis data which was inconsistent under Article 3.2 was used to find causation under Article 3.5. MOFCOM did not provide a reasoned and adequate explanation in attributing injury to the dumped imports, particularly in 2008 when the price of dumped imports was higher than that of the like domestic product. MOFCOM did not adequately consider other causes of injury in its non-attribution analysis.

III.b. Procedural Claims based on Article 6.5.1,6.9 and 12.2.2 of Antidumping Agreement.

i. Treatment of Non-confidential Summaries

EC under the procedural claims stated that the investigating authority i.e. MOFCOM was under compulsion to follow minimum procedural requirements enshrined under Antidumping agreement. EC claimed that MOFCOM was required to ask Nuctech to properly summarize the confidential information concerning the two models in respect of which Nuctech alleged dumping in its imposition of anti-dumping application, which it did not. Hence, it violated Article 6.5.1 of the AD Agreement.

ii. Disclosure of Essential Facts

Second claim of EC stated that MOFCOM did not disclose the essential facts to the interested parties which violated Article 6.9 of the AD Agreement. The essential facts include underlying data and methodology for price effect analysis, affiliated distributor adjustment to export price, determination of dumping margins for Smiths and determination of the residual anti-dumping duty.

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iii. **Public Notice**.

Third claim of EC was that the MOFCOM's investigation violated the requirement of public notice for imposition of definitive antidumping duties as required under Article 12.2.2 .

V. SUBSTANTIVE CLAIMS

i. **Price effect analysis**. First issue raised before Panel was, whether the MOFCOM's price effects findings were not based on an objective examination and violated Articles 3.1 and 3.2 of the AD Agreement.

The EU contended that MOFCOM's price effect analysis was not based on an objective examination of positive evidence and thus violates the Articles 3.1 and 3.2 of the AD Agreement. The EU claimed that MOFCOM's price effects methodology was flawed because it compared the weighted average unit values for the entire range of products covered by the investigation, without taking into account the considerable differences among the products, particularly between 'high-energy' and 'low-energy' scanners. The EU submitted that the "distorting effects" of MOFCOM's methodology were exacerbated by the fact that during the POI there were no exports of high-energy scanners from the EU to China.[4]Panel on this made an observation that it is not going to do the de novo review of the evidence or simply refer the conclusion of the MOFCOM, it is simply going to evaluate the reasoning behind the grounds taken by the investigating authority to impose the duties.

Panel relied on the definition of Positive evidence given by the appellate body in the US-Hot Rolled Steel. Appellate Body held that the positive evidence '*relates… to the quality of the evidence that authorities may rely upon in making a determination. The word 'positive' means…that the evidence must be of an affirmative, objective and verifiable character and that it must be credible*.' The Appellate Body also held that "positive evidence" refers to '*evidence that is relevant and pertinent with respect to the issue being decided and that has the characteristic of being inherently reliable and trustworthy'*.[5]

The EU contended that MOFCOM did not request or use the domestic price data on a model-by-model basis from the Nuctech to calculate the average unit price per year of the domestic product (Nuctech's products) with that of the subject import (Smiths' imports to China) as a whole. China confirmed that neither did MOFCOM know nor did it consider that the differences in energy levels were relevant for the price effects analysis under Article 3.2 of

[4] China – Definitive Anti-Dumping Duties on x-ray security inspection equipment from the European Union, WT/DS425/R Para 7.13,7.30

[5] Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, 4697

the AD Agreement and therefore it did not take such differences into account. China argued that if EU alleges that the like products under consideration are not like, then it should have raised this issue during the investigation itself. On this panel cited US-Lamb[6] where in the Appellate Body held that, *"In arguing claims in dispute settlement, a WTO Member is not confined merely to rehearsing arguments that were made to the competent authorities by the interested parties during the domestic investigation, even if the WTO Member was itself an interested party in the investigation".*

On the issue of whether the investigating authority should consider price comparability under price undercutting and price suppression analysis, on this panel referring *the EC-Bed Linen*[7] where the Appellate body held that irrespective of the methodology chosen to examine price effects, the investigating authority must conduct an objective examination of positive evidence. The panel concluded that an investigating authority must ensure that the prices it is using for its comparison are properly comparable. The panel also held that as soon as price comparisons are made, price comparability necessarily arises as an issue. Panel cited China-Goes in its observation on this issue.

Another contention of China was that the investigating authority must only consider not to do the determination as to whether there has been the significant price undercutting by the dumped imports. Panel on this contention held that the requirement to 'consider' price effects does not require a definitive determination regarding the existence of price undercutting, price suppression or price depression. Although, an investigating authority may be required to only 'consider' price effects, the consideration must involve an objective examination of positive evidence. The panel cited China-GOES where the Panel has stated that the word 'consider' is an obligation on the decision-maker to take something into account in reaching its decision. The panel held that the obligation to 'consider' than to make a 'determination' on the existence of price undercutting does not alter the substance or the nature of the enquiry required under Article 3.2 of the AD Agreement. Price comparability should be consistent under Article 3.1 which provides that a determination of injury be based on 'positive evidence' and involve an 'objective examination' of the effect of subject imports on the prices of domestic like products. Thereby, the panel in this dispute held that as soon as price comparisons are made, price comparability necessarily arises as an issue. The panel

[6] Appellate Body Report, *United States – Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, DSR 2001:IX, 4051

[7] Panel Report, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India*, WT/DS141/RW, adopted 24 April 2003, as modified by Appellate Body Report WT/DS141/AB/RW, DSR 2003:IV, 1269

held MOFCOM's approach to be inconsistent with the panel's finding in China-GOES as it is important to consider whether the dumped imports have explanatory force for the occurrence of suppression of domestic prices. The panel held that due to the reliance of price undercutting findings in the price suppression, the failure to ensure price comparability will also render MOFCOM's price suppression findings inconsistent with Article 3.1 and 3.2 of the AD Agreement

The EU argued that Smiths had stated during the investigation that there are differences between the 'low-energy' and 'high-energy' scanners when considering the product scope of investigation, but MOFCOM did not agree. China clarified that MOFCOM had considered the product scope under investigation but found that the products were '*like*' or *'price comparable'* the subject imports. China submitted that MOFCOM compared the prices of *like* products in its price effects analysis and it was sufficient to ensure price comparability. It was interesting to note that the Panel considered these images into consideration to evaluate whether the products are really comparable.

Pic. (i)

Pic.(ii)

Pic.(iii)

The scanners in picture (i) and (ii) were manufactured by the complainant Nuctech and scanner in pic (iii) was made by Smiths which were imported in China.[8] From these sample pictures we can assess the variance in the products under consideration.

The panel held that China acted inconsistently under Articles 3.1 and 3.2 by not ensuring that the prices it was comparing as a part of its price effects analysis were actually comparable. In particular, MOFCOM's price undercutting and price suppression analyses were inconsistent with Article 3.1 and 3.2 of the AD Agreement because they were not based on an objective examination of positive evidence. [9]

ii. Findings of injury to the domestic industry

Second substantive issue was dealing with the MOFCOM's examination of dumped imports on the domestic industry and their consistency under Articles 3.1 and 3.4 of the AD Agreement.

EU contented on few major issues that there was discrepancy between the MOFCOM's data and the data available in public record and provided by Nuctech. The EU contended that MOFCOM did not inform the parties to the investigation that the data forming the part of the on-site verification by the MOFCOM was modified. The panel cited *Thailand-H-Beams* where the Appellate Body has held that the positive evidence requirement under Article 3.1 is concerned with the nature of evidence than with the procedural obligations. The panel found that the EU did not establish that MOFCOM together with Nuctech could have adjusted aggregated data to exclude information relating to the export of the like products. The panel is satisfied that MOFCOM had information before it to draw a conclusion about export profitability in the final determination[10]

On the issue of credibility of modified data used by MOFCOM, EC contended that data provided by Nuctec was not credible. But panel held that the European Union did not establish a prima facie case that MOFCOM did not rely upon positive evidence in making its findings on the state of the domestic industry. Thus, it found that the EU has not made out a case that in this regard China acted inconsistently under Article 3.1 and 3.4 of the AD Agreement.[11]

[8] Referred from J.J.Nedumpara and V.Gyanchandani, *China – Definitive Anti-dumping duties on x-ray security inspection equipment from the European Union, WTO Dispute Analysis*, May 2013, Centre of WTO studies.
[9] China – Definitive Anti-Dumping Duties on x-ray security inspection equipment from the European Union, WT/DS425/R Para 7.97.
[10] China – Definitive Anti-Dumping Duties on x-ray security inspection equipment from the European Union, WT/DS425/R para 7.154
[11] Ibid Para 7.177

EU again contended that the MOFCOM acted inconsistently under Article 3.1 and 3.4 of the AD Agreement as it did not examine all factors listed in Article 3.4; particularly it failed to examine the magnitude of the margin of dumping. The panel noted that the Appellate Body and a number of panels have held that it is mandatory for an investigating authority to evaluate all of the 15 factors listed in Article 3.4 of the AD Agreement. Panel cited Thailand H-Beam case in this regard. It also cited EC- Bed Linen case where it was held that those matters listed are not merely a check list. The panel upheld the view under the text of Article 3.4 that the examination "shall" include an evaluation of all relevant economic factors, including the 15 listed factors in the provision which clearly requires that each of the factors be evaluated.

> *The panel settled that simple listing of the margins in the final determination and dumping sections of the determinations is inadequate evidence to conclude that the magnitude of the margin of dumping was evaluated in the context of examining the state of domestic industry. The panel held that an investigating authority is required to evaluate the margin of dumping and to assess the relevance as well as the weight to be attributed to it in the injury assessment. The panel held that MOFCOM failed to do this and was silent on the relevance or irrelevance of the magnitude of the margin of dumping in relation to the impact of the dumped imports on the domestic industry*[12]

Panel considered number of aspects which MOFCOM did not considered during investigation like, profit of Nuctech. The MOFCOM did not conclude that how it came that Nuctech did not realized the expected profit. Another important issue was the examination of interaction between positive and negative injury factors. Panel agreed with the EU contention that the MOFCOM's treatment of certain injury factors did not reflect an objective examination of the evidence. This consequently affects MOFCOM's overall assessment of the state of the industry. In addition, MOFCOM ignored trends in certain injury factors and did not explain the basis for some of its conclusions which undermined the overall assessment of the state of industry. MOFCOM also did not explain the developments in capacity utilization, productivity and wages in the descriptive section of its analysis of the industry

Thus taking this into consideration Panel held that MOFCOM did not conducted an objective examination. There was sheer failure on part of Panel to acknowledge each and every injury

[12] China – Definitive Anti-Dumping Duties on x-ray security inspection equipment from the European Union, WT/DS425/R Para 7.183

factor which could be reasonably be considered by the investigating authority. Panel was also of the view that MOFCOM's determination was not reasoned one; it could not provide the justification for the particular determination. The panel held that a balanced approach would have been to analyze all of the 16 factors in the description of the state of industry and weigh them in the assessment. Panel concluding its observation on this second issue stated that MOFCOM needed some compelling explanation regarding the interaction between the positive and negative injury factors than what it really provided.

iii. **Causality (EU's claim that the price effects methodology employed by China under Article 3.2 invalidates MOFCOM's causation findings as the price effect analysis data which was inconsistent under Article 3.2 was used to find causation under Article 3.5.)**

Third substantive issue was whether the MOFCOM failed to make an objective examination in determining whether the dumped imports were through the effects of dumping, causing injury to the domestic industry under Articles 3.1 and 3.5 of the AD Agreement

The panel considered each aspect in this regard and came to the observation that the MOFCOM did not consider the differences between the products under consideration in its price effect analysis. Panel held that the MOFCOM's price effect analysis suffered grave misapplication of rules under Article 3.1 and 3.2 discussed above, thus it held that it failed to consider price comparability while undertaking price effect analysis.

Another issue raised by the EC was whether the MOFCOM did the correct linking of the effect of alleged dumping with that of the reduction of prices in the domestic market. Panel held that the though MOFCOM concluded that dumped imports were the cause but did not explain how the dumped products were the only cause of injury to the domestic industry. Panel on the contrary was of the view that it appeared that Nuctech lowered its prices to increase its market share than to defend or maintain it. Further, MOFCOM's non-attribution analysis lacked a reasoned and adequate explanation as to why Nuctech lowered its prices below those of the dumped imports in 2008, to such an extent that its market share increased. Panel held that the MOFCOM's analysis was both adequate due t its failure to explain why the prices of domestic scanners could not rise to the level of the alleged dumped imports in 2008.

Another issue was the examination of relevant and other known factors which are causing injury.EU argued that the MOFCOM acted inconsistently with Articles 3.1 and 3.5 by failing to consider all facts and arguments on the record relevant to be considered to determine the

final margin. EU argued that there were known factors which were, impact of global financial crisis, fair compensation between Nuctech and other producers, Nuctech's aggressive business expansion, Nuctech aggressive pricing and Nuctech start-up situation

Panel considered the effect of each of these factors and then eventually held '*MOFCOM acted inconsistently with Articles 3.1 and 3.5 of the AD Agreement 'by failing to conduct an objective examination of the evidence on the record'. The Panel noted that MOFCOM failed to separate and distinguish the injurious effects of other causal factors from those of the dumped imports which violated the non-attribution requirement of Article 3.5. In this regard, MOFCOM failed to consider the evidence on the record regarding the known factors listed above. The panel concluded that MOFCOM's causation analysis, which rests upon these findings, is inconsistent with Article 3.5 and reached an overall conclusion that China acted inconsistently with Article 3.1 and 3.5 of the AD Agreement*'.[13]

VI. PROCEDURAL ISSUES

i. Treatment of Non Confidential summaries.

Article 6.5.1 requires parties submitting confidential information to provide non confidential summaries. These summaries are required to provide reasonable understanding of the issue in the sufficient detail which was submitted in the confidence. Under Article 6.5.1 there is a exception clause, which provides that in the exceptional circumstances parties may not provide the summaries. But there is a proviso clause attached to this exception clause that the parties should state the reasoning that why they are not submitting a summary.

EU challenged the MOFCOM's treatment of non confidential summaries on both these aspects. EU identified and provided number of instances where MOFCOM accepted the summaries which were insufficient to provide EU any reasonable information, and another contention was that MOFCOM gave the relaxation to the Public Security Bureau which was also involved in the investigation to be exempted from giving the summary without providing reasons that why such a Bureau was not required to give the summary. The Panel upheld the EU's claims that the non-confidential summaries provided by Nuctech were not adequate, and thus were contrary to Article 6.5.1. The Panel also upheld the EU's claim that MOFCOM had improperly invoked the Article 6.5.1 "exceptional circumstances" mechanism by failing to

[13]China – Definitive Anti-Dumping Duties on x-ray security inspection equipment from the European Union, WT/DS425/R, Para 7.300

require a statement of reasons why the relevant confidential information could not be summarized.

ii. Disclosure of essential facts

To conduct a determination the investigating authority generally rely on a methodology through which it establishes the dumping on the imported product. Such methodology constitutes a essential facts apart from this the adjustments which investigating authority does in order to come to a correct determination along with other data are essential facts which has to be reasonable and must be having some basis. But in this instant case EU claimed that in violation of Article 6.9 of the Anti-Dumping Agreement, MOFCOM failed to disclose certain essential facts to interested parties, including: (i) the underlying data and methodology used by MOFCOM in its price analysis, (ii) adjustments made by MOFCOM to the export price with respect to sales to an affiliated distributor, (iii) the data and adjustments applied by MOFCOM in determining the margin of dumping and (iv) the available facts used by MOFCOM to establish the residual anti-dumping duty. The EU also pursued dependent claims under Articles 6.2 and 6.4.Panel was in consonance with the claims f the EU that there was violation of Article 6.9 by China. Panel relied on the findings of the report of the Appellate Body in *China — Countervailing and Anti-dumping Duties on Grain Oriented Flat rolled Electrical Steel from the United States.* Panel determined that the MOFCOM should have provided the methodology which it applied, the adjustments which it made along with average unit values and underlying price data that it would use to analyze price effects of the dumped imports.

iii. Public Notification

Another important procedural requirement is of the public notification. EU claimed that MOFCOM did the violation of Article 12.2.2 of the Antidumping Agreement. 12.2.2 of the Agreement on Anti Dumping requires that the public notice should have certain relevant information on the matters of both fact and law which eventually led to the imposition of the final measures. Another requirement under this Article is that there should be stated the grounds for the rejection of the arguments made by the respondent in the course of investigation. Though the panel upheld the EU's claim there the public notice lack both these essential requirements; however panel also determined that there is no requirement to include antidumping margins in the public notice. Panel accepted the EU's claim that there was no relevant information regarding the price effect analysis by MOFCOM and how did it came to conclusion of determination of residual rate. Although panel rejected the argument of the EU

that there was the requirement to provide the dumping margin as the essential fact in the public notice.

VII. CONCLUSION

In this case China (MOFCOM) imposed antidumping duties without considering the procedural requirements laid down by the Agreement of Anti Dumping. There was a gross failure on part of the MOFCOM to determine the likeness of the products under consideration. Both the producers were engaged in producing different types of scanners. Both of those products were of different intensity and were not interchangeable with each other. MOFCOM didn't consider other relevant factors that could have led adverse effect to the domestic industry. Not considering the other relevant factors like economic crisis of 2008 could not lead to the proper price effect analysis. During the complete investigation MOFCOM relied on the informations given by the Nuctech which were not credible. There were other procedural violations that leniency given to Public Security Bureau for not submitting summaries and also not stating the reasons for non submission. The proper deliberation should have been done and the methodology, adjustments etc used by the investigating authority must be provided to the other party so that it could counter the legitimacy of such. But in this claim the MOFCOM applied certain methodology but didn't provide the same to the EU for consideration. The complete investigation was lacking the reason. It looked like that the investigating authority arbitrarily without on the sufficient grounds imposed the anti dumping duties on the imports it was evident from the panel findings. There was no appeal before the Appellate Body and the implementation was notified on 26th February 2014.

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