

7.406. We rejected all these three arguments when addressing Japan's claims under Article 6.9. The same considerations that led us to reject those arguments in the context of Japan's claims under Article 6.9 (set out in paragraphs 7.367-7.370 above) also lead us to reject these three arguments in the context of Japan's claims under Articles 12.2 and 12.2.2. Accordingly, we find that Japan has not established that MOFCOM failed to provide sufficient background and reasons for its findings with respect to the definition of the domestic industry.

7.407. Based on the foregoing, we find that Japan has not established that MOFCOM's public notice with respect to the definition of the domestic industry was inconsistent with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement.

7.9 Japan's consequential claims under Article 1 of the Anti-Dumping Agreement and Article VI:6(a) of the GATT 1994

7.408. Japan makes claims under Article 1 of the Anti-Dumping Agreement and Article VI:6(a) of the GATT 1994, which are entirely dependent on Japan's claims of violation under other provisions of the Anti-Dumping Agreement. We do not consider that making findings with respect to Japan's purely consequential claims will contribute towards the positive resolution of this dispute. Accordingly, we make no findings with respect to Japan's claims under Article 1 of the Anti-Dumping Agreement and Article VI:6(a) of the GATT 1994.

8 CONCLUSIONS AND RECOMMENDATION

8.1. For the reasons set forth in this Report, we conclude as follows:

- a. With respect to China's request that we find that Japan is precluded, in light of its panel request, from making the claims presented in its first written submission challenging MOFCOM's definition of the domestic industry:
 - i. For the reasons set out in paragraph 7.15 above, we find that Japan is not precluded from making the claims presented in its first written submission challenging MOFCOM's definition of the domestic industry; and
 - ii. Japan's claim challenging MOFCOM's definition of the domestic industry, based on Article 3.1 of the Anti-Dumping Agreement, is a consequential claim.
- b. With respect to Japan's claims concerning MOFCOM's definition of the domestic industry:
 - i. Japan has established that MOFCOM's definition of the domestic industry was inconsistent with Article 4.1 of the Anti-Dumping Agreement because MOFCOM failed to provide a reasoned and adequate explanation of its finding that the production of the firms included in the domestic industry represented a "major proportion" of the total production of all Chinese producers.
 - ii. Japan has not established that MOFCOM's definition of the domestic industry was inconsistent with Article 4.1 of the Anti-Dumping Agreement because of:
 - (1) the alleged discrepancy between the domestic industry's market share data and its share in domestic production; and
 - (2) the alleged lack of representativeness of the domestic industry.
 - iii. In the light of these findings, and for the reasons set out in paragraph 7.57 of this Report, we decline to make additional findings in relation to Japan's consequential claim under Article 3.1 of the Anti-Dumping Agreement.
- c. With respect to Japan's claims concerning MOFCOM's decision to cumulate imports from the different sources under investigation:
 - i. Japan has not established that MOFCOM acted inconsistently with Articles 3.1 and 3.3 of the Anti-Dumping Agreement in finding that a cumulative assessment of the effects

of the subject imports was appropriate in light of, *inter alia*, the conditions of competition between the imported products, and the conditions of competition between the imported products and the like domestic product.

- ii. In light of this finding, we also reject Japan's claims that the MOFCOM's price effects analyses, impact analyses and causation findings were, respectively, inconsistent with Articles 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement as a consequence of MOFCOM's alleged violation under Articles 3.1 and 3.3.
- d. With respect to Japan's claims concerning MOFCOM's price effects analysis:
- i. Japan has established that MOFCOM acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement because in making its findings on price effects, MOFCOM failed to ensure that there was no issue of price comparability between the product categories. In particular, MOFCOM acted inconsistently with these provisions for the following reasons:
 - (1) to the extent that MOFCOM's price effects findings were based on China's view that the obligation to ensure price comparability is triggered only when there are significant price differences between product categories, MOFCOM proceeded on a misconceived understanding of the notion of price comparability;
 - (2) MOFCOM failed to base its determination of price comparability on an objective assessment of positive evidence because it relied on its scope of subject product findings, without any further explanation, to show that there were no price comparability issues between product categories;
 - (3) MOFCOM failed to identify the best information available relied on to make the finding of "reasonable differences" in prices, and MOFCOM did not explain how the best information available it selected supported this finding. MOFCOM also did not explain how a finding of "reasonable differences" between product categories could be understood to mean that there was no issue of price comparability as regards the products categories; and
 - (4) MOFCOM did not objectively examine the record evidence regarding the non-price differences between product categories submitted by Japanese respondents before MOFCOM.
 - ii. Japan has established that MOFCOM's series-specific price effects analyses were not based on an objective examination of positive evidence and, therefore, inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement, because MOFCOM failed to preclude the possibility that the observed changes in average series-specific prices resulted from changes in the product category mix rather than genuine changes in series-specific prices.
 - iii. Japan has established that MOFCOM's overall conclusion of price depression was inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement because it was dependent on MOFCOM's flawed findings of price comparability between product categories and series-specific price effects.
 - iv. In the light of these findings, and for reasons set out in paragraphs 7.161, 7.162, 7.174, and 7.177 above, we decline to make findings on the merits of Japan's additional arguments in support of its claim under Articles 3.1 and 3.2 of the Anti-Dumping Agreement.
- e. With respect to Japan's claims concerning MOFCOM's analysis of the state of the domestic industry:
- i. Japan has established that MOFCOM acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement because:

- (1) MOFCOM's findings on trends in sales prices were based on its flawed consideration of price effects;
 - (2) MOFCOM failed to perform an objective examination of domestic market share for the purpose of examining the impact of the subject imports on the domestic industry; and
 - (3) MOFCOM failed to objectively examine the evidence concerning capacity utilization and ending inventory, and did not provide a reasoned and adequate explanation of its findings with respect to these economic indices.
- ii. Japan has not established that MOFCOM acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement when examining, in the context of its impact analysis, the domestic industry's sales volume, apparent domestic consumption, pre-tax profits, and return on investment.
 - iii. In the light of these findings, and for reasons set out in paragraph 7.228 above, we decline to make findings on the merits of Japan's additional arguments in support of its claim under Articles 3.1 and 3.4 of the Anti-Dumping Agreement.
- f. With respect to Japan's claims concerning MOFCOM's determination on causation:
- i. Japan has established that MOFCOM's causation analysis was inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement because:
 - (1) MOFCOM's causation analysis relied on its price effects and impact analyses, which were inconsistent with Articles 3.1, 3.2 and 3.4 of the Anti-Dumping Agreement;
 - (2) MOFCOM's analysis of the increase in nickel prices since mid-2016 as a factor other than dumped imports allegedly injuring the domestic industry at the same time was not based on an objective examination of positive evidence, and was not reasonably and adequately explained.
 - ii. Japan has not established that MOFCOM erred by not examining the decrease in the price of nickel from May 2014 to the end of 2015 as a factor other than dumped imports allegedly injuring the domestic industry at the same time.
 - iii. Japan has not established that MOFCOM failed to objectively examine the evidence submitted by the interested parties concerning the impact on the domestic industry of the cost-increases associated with the adoption of stricter environmental standards.
 - iv. In the light of these findings, and for reasons set out in paragraph 7.240 above, we decline to make findings on the merits of Japan's claim under Article 3.1 and the second sentence of 3.5 of the Anti-Dumping Agreement.
- g. With respect to Japan's claims concerning the confidential treatment of certain company names in the domestic industry's application:
- i. Japan has not established that MOFCOM acted inconsistently with Article 6.5 of the Anti-Dumping Agreement when it accepted, by implication, that the good cause the applicant presented justified the redaction of the company names at the time it made its application.
 - ii. Japan has not established that MOFCOM acted inconsistently with Article 6.5.1 of the Anti-Dumping Agreement by not requiring the interested parties that provided the confidential information to furnish non-confidential summaries thereof.
- h. With respect to Japan's claims concerning the disclosure of essential facts under consideration which formed the basis for MOFCOM's decision to apply definitive measures:

- i. Japan has established, for the reasons set out in paragraph 7.319 above, that MOFCOM acted inconsistently with Article 6.9 of the Anti-Dumping Agreement in not disclosing the essential facts underlying its price effects analysis.
 - ii. Japan has established, for the reasons set out in paragraph 7.358 above, that MOFCOM acted inconsistently with Article 6.9 of the Anti-Dumping Agreement in not disclosing the essential facts underlying its causation determination in relation to the fluctuation in nickel prices.
 - iii. Japan has not established, for the reasons set out in paragraphs 7.330, 7.337, 7.352, 7.363, and 7.371, respectively, that MOFCOM acted inconsistently with Article 6.9 of the Anti-Dumping Agreement in relation to its disclosure of the essential facts pertaining to the following:
 - (1) MOFCOM's cumulation analysis;
 - (2) MOFCOM's examination of the state of the domestic industry;
 - (3) MOFCOM's causation determination in relation to cost of environment regulations; and
 - (4) MOFCOM's definition of the domestic industry.
 - iv. For the reasons set out in paragraph 7.325 of this Report, we decline to make additional findings on the merits of Japan's claim with respect to the alleged lack of disclosure concerning MOFCOM's definition of the product under consideration.
- i. With respect to Japan's claims concerning the adequacy of the public notice published by MOFCOM:
- i. Japan has not established, for the reasons set out in paragraphs 7.389, 7.397, 7.403, and 7.407, respectively, that MOFCOM's public notice in relation to the following was inconsistent with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement:
 - (1) MOFCOM's cumulation analysis;
 - (2) MOFCOM's examination of the state of the domestic industry;
 - (3) MOFCOM's causation determination in relation to cost of environment regulations; and
 - (4) MOFCOM's definition of the domestic industry.
 - ii. For the reasons set out in paragraphs 7.381, 7.384, and 7.401 above, we decline to make additional findings on the merits of Japan's submissions with respect to the consistency of the following aspects of MOFCOM's public notice with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement:
 - (1) MOFCOM's price effects analysis;
 - (2) MOFCOM's definition of the product under consideration; and
 - (3) MOFCOM's causation determination in relation to the fluctuation in nickel prices.
- j. For the reasons set out in paragraph 7.408 above, we decline to make additional findings with respect to Japan's claims under Article 1 of the Anti-Dumping Agreement and Article VI:6(a) of the GATT 1994.

8.2. Under Article 3.8 of the DSU, in cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. We conclude that, to the extent that the measures at issue are inconsistent with the Anti-Dumping Agreement, they have nullified or impaired benefits accruing to Japan under this agreement.

8.3. Pursuant to Article 19.1 of the DSU, we recommend that China bring its measures into conformity with its obligations under the Anti-Dumping Agreement.
