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## *China - HP-SSST and Price Undercutting*

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— Comment —

*CHINA—HP-SSST* AND PRICE  
UNDERCUTTING

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INTRODUCTION

On October 28, 2015, the World Trade Organization’s (WTO) Dispute Settlement Body adopted an Appellate Body report ruling on *China—HP-SSST*.<sup>1</sup> It concluded that Chinese antidumping duties, imposed on high performance stainless steel seamless tubes (HP-SSSTs), violated the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Antidumping Agreement) and the General Agreement on Tariffs and Trade 1994 (GATT).<sup>2</sup> The Appellate Body upheld the prior Panel decision and clarified requirements of national investigating authorities conducting antidumping injury analyses. WTO case law is notably underdeveloped regarding dumping investigation injury procedures.<sup>3</sup>

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1. Appellate Body Reports, *China—Measures Imposing Anti-Dumping Duties on High Performance Stainless Steel Seamless Tubes (“HP-SSST”) From Japan, China—Measures Imposing Anti-Dumping Duties on High Performance Stainless Steel Seamless Tubes (“HP-SSST”) From the European Union*, WTO Docs. WT/DS454/AB/R, WT/DS460/AB/R (adopted Oct. 28, 2015) [hereinafter HP-SSST Appellate Body Reports].
  2. *Id.* at 104, 107; Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, 108 Stat. 4809, 1868 U.N.T.S. 201 [hereinafter Antidumping Agreement]; General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].
  3. JOHN H. JACKSON ET AL., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS CASES, MATERIALS AND TEXT 913 (6th ed. 2013) (“WTO case law in [material injury investigations] is spotty.”).

Steel is one product that is frequently subject to antidumping investigations.<sup>4</sup> Likewise, Chinese exporters are often targets of antidumping investigation.<sup>5</sup> This is especially relevant to Chinese steel. The Chinese steel industry has grown rapidly since 1978, when it was the world's fifth largest steel producer.<sup>6</sup> Fast-forward twenty-eight years, China dominated the world's steel market. In 2006, it produced 400 million tons.<sup>7</sup> It currently produces more than any other country. In fact, China churns out more steel than the United States, the European Union, Russia, and Japan combined.<sup>8</sup>

Chinese steel is also relevant to how China treats steel imports. *China—HP-SSST* involves an antidumping investigation conducted by Chinese authorities to determine whether European and Japanese manufacturers were dumping HP-SSSTs in China. This case comment presents an overview of *China—HP-SSST*. It focuses on the current Chinese injury analysis under WTO and Chinese law. Part I provides a brief overview of WTO antidumping laws and injury analysis proceedings. Part II summarizes the Appellate Body's critical holdings in *China—HP-SSST*. Part III concludes with a critique of the case's key holding, on price undercutting, and considers statistics about China as a respondent in antidumping cases.

## I. OVERVIEW OF DUMPING LAWS

Dumping is simple in theory but complex in application. It occurs when a producer in one country exports goods and endeavors to sell

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4. XIAOCHEN WU, ANTI-DUMPING LAW AND PRACTICE OF CHINA 4 (2009) (“The steel and chemical industries have been the principal focus of anti-dumping investigations around the world . . .”).
  5. From January 1, 1995, to December 31, 2014, Chinese exports were subject to 1,052 antidumping investigations throughout the world. This is more than any other country during the period. The second closest was the Republic of Korea, which was investigated 349 times. WTO, ANTI-DUMPING INITIATIONS: BY EXPORTER 01/01/1995–31/12/2014, [https://www.wto.org/english/tratop\\_e/adp\\_e/AD\\_InitiationsByExpCty.pdf](https://www.wto.org/english/tratop_e/adp_e/AD_InitiationsByExpCty.pdf) [<https://perma.cc/E3JQ-NWTB>] (last visited Mar. 7, 2016).
  6. WU, *supra* note 4, at 3–4 (“[I]n 1978, China’s total steel output was 31.78 million tons and ranked the world’s fifth largest. By 1996, China had become the world’s largest steel producer, its output having reached 101.24 million tons. In 2006, China’s steel output was more than 400 million tons.”).
  7. *Id.* at 4.
  8. Ivana Kottasova, *China’s Slowdown is Killing Thousands of Steel Jobs*, CNN (Oct. 19, 2015, 1:04 PM), <http://money.cnn.com/2015/10/19/news/economy/china-slowdown-steel-jobs> [<https://perma.cc/2VES-JFW2>] (“China produces half of the world’s steel, more than the United States, European Union, Russia and Japan combined.”).

them in another country below normal value.<sup>9</sup> The difference between normal value and export price is called the dumping margin.<sup>10</sup> The GATT condemns dumping when it causes material injury to producers in an importing country.<sup>11</sup> In spite of condemnation, it is impossible for WTO members to contest dumping before the Dispute Settlement Body (DSB).<sup>12</sup> Instead, members conduct self-directed dumping investigations.<sup>13</sup>

The Antidumping Agreement is a touchstone for investigation procedures. An affirmative dumping investigation presumes a determination of dumping and a determination of injury.<sup>14</sup> Procedures are based on the Antidumping Agreement, but vary by country.<sup>15</sup> The United States divides investigations between the International Trade Administration (ITA) and the International Trade Commission (ITC).<sup>16</sup> The ITA accepts initial petitions to conduct dumping investigations.<sup>17</sup> It also directs determinations of dumping.<sup>18</sup> The ITC directs determinations of injury.<sup>19</sup> In China, the Chinese Ministry of Foreign Commerce

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9. Antidumping Agreement, *supra* note 2, art. 2.1.
  10. The price of a good in its originating country is called its “normal value” (NV). NV is compared to the good’s price in the importing country, which is called “export price” (XP). *Id.* An investigating authority may substitute other values for NV. For instance, it may compare the price of the good in a third-party country or the cost of production plus a reasonable amount for profit with XP. *Id.* art. 2.2.
  11. GATT, *supra* note 2, art. VI.
  12. The Dispute Settlement Body governs and settles disputes tendered to the WTO. It has the power to establish panels and to adopt panel and appellate body reports referred by members. Understanding on Rules and Procedures Governing the Settlement of Disputes art. 2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401. *See also* DANIEL T. SHEDD ET AL., CONG. RESEARCH SERV., RS20088, DISPUTE SETTLEMENT IN THE WORLD TRADE ORGANIZATION (WTO): AN OVERVIEW (2012) (discussing the WTO process for dispute resolution among member nations).
  13. Antidumping Agreement, *supra* note 2, arts. 1, 5.
  14. *Id.* arts. 2, 3.
  15. HP-SSST Appellate Body Reports, *supra* note 1, ¶ 5.141 (“Article 3 does not prescribe a specific methodology to be relied on by an investigating authority in its determination of injury.”).
  16. William J. Davey & John H. Jackson, *Reform of the Administrative Procedures Used in U.S. Antidumping and Countervailing Duty Cases*, 6 ADMIN. L.J. AM. U. 399, 407 (1992).
  17. *Id.* at 408.
  18. *Id.* at 408–09.
  19. *Id.* at 408. For an extensive explanation of American dumping investigations, see *id.* at 407–20.

(MOFCOM) conducts both determinations of dumping and the determinations of injury.<sup>20</sup>

When determining dumping, an investigating authority calculates Normal Value and Export Price.<sup>21</sup> The difference between these variables is the dumping margin.<sup>22</sup> A determination of injury relies on positive evidence and must achieve an objective examination.<sup>23</sup> It focuses on several elements that comprise an objective examination.<sup>24</sup> The first element is the volume of the dumped imports and “whether there has been a significant increase in dumped imports.”<sup>25</sup> The second element is the effect of the dumped imports on the price of domestic goods.<sup>26</sup> The final element is the overall impact of the dumped goods on the domestic industry.<sup>27</sup> While the Antidumping Agreement lists these three factors as integral components of a balanced determination of injury, it does not provide details on how they should be weighed to deduce injury.<sup>28</sup> In addition, the determination of injury presumes a finding of causation. To find causation, an investigating authority must eliminate nonattributing factors, forces other than dumping that cause material injury to the relevant industry.<sup>29</sup>

If the investigating authority finds dumping, injury, and causation, then it may impose an antidumping duty.<sup>30</sup> Duties cannot exceed the

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20. For an extensive explanation of Chinese dumping investigations, see Wu, *supra* note 4, at 145–74.
  21. *See supra* note 10.
  22. Antidumping Agreement, *supra* note 2, art. 2.1.
  23. Positive evidence describes “the quality of the evidence that the investigating authorities may rely on in making a determination, and requires the evidence to be affirmative, objective verifiable, and credible.” HP-SSST Appellate Body Reports, *supra* note 1, ¶ 5.138. An objective examination requires a determination of injury “conform to the dictates of the basic principles of good faith and fundamental fairness” and be unbiased so that it does not favor any interested party. *Id.*
  24. *Id.* ¶¶ 5.137–5.139; Antidumping Agreement, *supra* note 2, art. 3.1.
  25. Antidumping Agreement, *supra* note 2, art. 3.2.
  26. *Id.* arts. 3.1, 3.2.
  27. *Id.* arts. 3.1, 3.4.
  28. *Id.* art. 3.2 (“No one or several of these factors can necessarily give decisive guidance.”).
  29. *Id.* art. 3.5 (“The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports.”).
  30. GATT, *supra* note 2, art. VI.2.

dumping margin.<sup>31</sup> The goal of antidumping duties is to reduce market distortions and allow all producers “an equal chance to compete.”<sup>32</sup> If a producer believes that an antidumping duty is wrongful, it must request that its government seek corrective action before the WTO DSB.<sup>33</sup>

## II. CHINA—HP-SSST

*China—HP-SSST* began when MOFCOM conducted a dumping investigation on HP-SSSTs imported from the European Union and Japan.<sup>34</sup> The contentious products—high-performance, stainless-steel seamless tubes—are components in industrial boilers.<sup>35</sup> MOFCOM investigated the normal value and export price of imported HP-SSSTs between July 1, 2010, and June 30, 2011, and then evidence of injury to the domestic industry between January 1, 2008, and June 30, 2011.<sup>36</sup> It ultimately determined that Japan and the EU dumped HP-SSSTs into the Chinese market, causing material injury, and then imposed an antidumping duty, which European and Japanese manufacturers contested.<sup>37</sup>

Salzgitter Mannesmann Stainless Tubes and Tubacex Tubos Inoxidables, S.A., from Europe, and Sumitomo Metal Industries and Kobe Special Tube Co. Ltd., from Japan, (Complainants) petitioned

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31. *Id.* (“[A] contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping . . .”).
  32. JACKSON ET AL., *supra* note 3, at 831 (“The basic idea behind [unfair trade] rules is sometimes expressed as a desire to create a level playing field where the producers of the world all have an equal chance to compete.”).
  33. Antidumping Agreement, *supra* note 2, art. 17.
  34. See HP-SSST Appellate Body Reports, *supra* note 1, ¶ 1.4 (“China’s measure at issue in these disputes are set forth in the Preliminary Determination and Final Determination of the Ministry of Commerce of the People’s Republic of China (MOFCOM).”). The two Chinese HP-SSST producers that petitioned MOFCOM to institute the dumping duty are Jiangsu Wujin Stainless Steel Pipe Group Co., Ltd. and Changshu Walsin Specialty Steel Co., Ltd. *Id.* ¶ 5.206 n.457.
  35. *Id.* ¶ 1.4 (“HP-SST is mainly used in the manufacture of pressurized components such as superheaters and reheaters of supercritical and ultra-supercritical boilers.”). Boilers produce energy in power plants. *Id.* ¶ 5.264 (quoting investigated Japanese exporters) (“[S]teel tubes used in ultra-supercritical power plant boilers . . . significantly outperform steel tubes used in supercritical power plant boilers . . .”).
  36. *Id.* ¶ 1.4 n.20 (“The period of investigation (POI) for the determination of dumping was from 1 July 2010 to 30 June 2011, and the POI for the determination of injury was from 1 January 2008 to 30 June 2011.”). See *supra* note 10.
  37. *Id.* ¶¶ 1.2, 1.4, 1.5.

their governments to initiate consultations with China.<sup>38</sup> When consultations failed, the Complainants requested that the DSB convene a panel to resolve the controversy.<sup>39</sup> The Panel report held in favor of the Complainants, deciding that MOFCOM violated Article 3 of the Antidumping Agreement.<sup>40</sup> It stopped short of holding that MOFCOM failed to abide by Articles 3.1 and 3.2 in finding that Grade C imported tubes had undercutting effects on domestic Grade C tubes.<sup>41</sup> It also declined the Complainants' contention that MOFCOM improperly extended price findings pertaining to Grades B and C to domestic Grade A tubes.<sup>42</sup>

All three parties appealed.<sup>43</sup> The DSB referred the report to the Appellate Body, which issued a second report affirming and bolstering the initial decision.<sup>44</sup> The Appellate Body's report addressed China's determination of injury extensively.<sup>45</sup> MOFCOM's injury procedures incorporate the WTO rubric of Article 3 of the Antidumping Agreement.<sup>46</sup> The Anti-Dumping Regulations of the People's Republic of China implement requisite aspects of the Antidumping Agreement.<sup>47</sup> In

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38. HP-SSST Appellate Body Reports, *supra* note 1. Consultations are the first step of a dispute before requesting the DSB convene a panel. GATT, *supra* note 2, art. XXII.
39. Panel Reports, *China—Measures Imposing Anti-Dumping Duties on High Performance Stainless Steel Seamless Tubes (“HP-SSST”) From Japan, China—Measures Imposing Anti-Dumping Duties on High Performance Stainless Steel Seamless Tubes (“HP-SSST”) From the European Union*, ¶¶ 1.2, 1.3, WTO Docs. WT/DS454/R, WT/DS460/R (adopted Feb. 14, 2015) [hereinafter HP-SSST Panel Reports]. As many issues raised by Japan and the EU overlapped, the Panel (and later the Appellate Body) consolidated both cases into a single report.
40. *Id.* ¶ 7.144.
41. *Id.*
42. *Id.*
43. HP-SSST Appellate Body Reports, *supra* note 1, ¶ 1.1.
44. *Id.* ¶ 5.5.3.2.
45. This case comment focuses on issues relating to the Appellate Body's rulings on MOFCOM's injury determination. It does not include any discussion on whether MOFCOM correctly calculated normal value, whether it improperly withheld essential facts about its determination of dumping, or whether MOFCOM's procedures failed to protect business confidential information.
46. Zhōng Huá Rén Mín Gònǎng Hé Guó Fǎn Qīng Xiāo Tiáo Lì (中华人民共和国反倾销条例) [Anti-Dumping Regulations of the People's Republic of China] (promulgated by the St. Council P.R.C., Nov. 26, 2001, amended Mar. 31, 2004, effective Feb. 17, 2005) Ministry of Commerce, at art. 8, <http://english.mofcom.gov.cn/aarticle/policyrelease/domesticpolicy/200502/20050200017435.html> [<https://perma.cc/W7HN-LU9V>].
47. *Id.*

addition, MOFCOM issues Provisions on Industry Injury Investigation for Anti-Dumping, detailing how MOFCOM deduces injury.<sup>48</sup> A determination of injury proceeds according to Article 3.1 of the Antidumping Agreement. The Chinese determination of injury begins by ascertaining domestic-like products.<sup>49</sup> In *China—HP-SSST*, HP-SSSTs included three grades of tubes Grade A, B, and C.<sup>50</sup> The Complainants contested MOFCOM's material injury conclusions.<sup>51</sup>

The Appellate Body report begins by establishing precedent.<sup>52</sup> It recognizes that Article 3 paragraphs 3.1, 3.2, 3.4, and 3.5 create a “logical progression” for every determination of injury.<sup>53</sup> The logical progression is a gradual process where one conclusion informs the next.<sup>54</sup> Each interlocked step builds on the last, leading to a determination on whether the domestic industry suffered material injury.<sup>55</sup> For instance, the outcome regarding whether dumped goods have a price effect must serve as a “meaningful basis” for a national investigator to assess the

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48. WU, *supra* note 4, at 405–11.

49. *Id.* at 85–89.

50. HP-SSST Appellate Body Reports, *supra* note 1, ¶ 5.179 (“MOFCOM defined the domestic like product as certain HP-SSST, encompassing three product types or grades referred to by the Panel as Grades A, B, and C.”). Grade A tubes are the least expensive, and Grade C tubes are the most expensive. *Id.* ¶ 5.181 (“Grade B is approximately double the price of Grade A, and Grade C is approximately triple the price of Grade A.”). The Chinese domestic industry was defined as two producers. HP-SSST Panel Reports, *supra* note 38, ¶ 7.153 (“MOFCOM defined the domestic industry as comprising two domestic producers accounting for a majority proportion of total domestic production of the domestic product like the subject imports.”).

51. HP-SSST Appellate Body Reports, *supra* note 1, ¶¶ 5.136–5.298. China defines material injury as “actually caused and non-negligible injuries to domestic industries.” WU, *supra* note 4, at 406.

52. HP-SSST Appellate Body Reports, *supra* note 1, ¶¶ 5.136–142.

53. *Id.* ¶ 5.140.

54. *Id.* ¶¶ 5.140, 5.162 (“Article 3 thus contemplates a ‘logical progression’ in the investigating authority’s examination leading to an ultimate determination of whether dumped imports are causing material injury to the domestic industry . . . . A proper assessment of price effects under Article 3.2 is, therefore, a necessary building block for the ultimate determination of injury.”).

55. *Id.* ¶ 5.141 (“Nor is there a prescribed template or format that an investigating authority must adhere to in making its determination of injury, provided that its determination comports with the disciplines that apply under the discrete paragraphs of Article 3. These disciplines are necessary, interlinked elements of a single, overall analysis addressing the question of whether dumped imports are causing injury to the domestic industry.”).



relationship between the price of dumped goods and the state of the domestic industry.<sup>56</sup>

*A. Price Undercutting*

The Complainants contested the Panel's interpretation of price undercutting. Japan renewed the argument that MOFCOM's method for finding price undercutting, where it merely found imported tube prices were mathematically lower than domestic tube prices, was inadequate because it failed to produce information about the effect of the dumped imports on domestic prices.<sup>57</sup> The EU added that a simple comparison of prices over a single year must be combined with other relevant facts, such as "inverse price movements, a sudden and substantial increase in the domestic prices, an increase in the market share of domestic . . . products, and an absence of substitutability."<sup>58</sup> These considerations are all helpful in explaining the effect of dumped goods on domestic products.<sup>59</sup> The Appellate Body agreed. It reversed the Panel, and held that price undercutting investigations must do more than merely compare prices, they must compare prices over time.<sup>60</sup> Such an examination reveals price movements and "trends in the relationship between the prices of the dumped imports and those of domestic like products."<sup>61</sup> The Appellate Body essentially found a violation because MOFCOM did not consider why prices for imported tubes were lower, only that they were objectively lower.

The Appellate Body also fleshed out the word "significant."<sup>62</sup> It explained that whether price undercutting is significant depends on "the

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56. *Id.* ¶ 5.162 ("[T]he outcome of the price effects inquiry . . . must be one that enables the investigating authority to advance its analysis so as to serve as a meaningful basis for its determination as to whether subject imports, through such price effects, are causing injury to the domestic industry.").

57. *Id.* ¶ 5.151.

58. *Id.* ¶ 5.152.

59. *Id.*

60. *Id.* ¶ 5.159.

61. *Id.* ("[A] proper reading of 'price undercutting' . . . suggests that the inquiry requires a dynamic assessment of price developments and trends in the relationship between the prices of the dumped imports and those of domestic like products over the entire period of investigation (POI).") *Id.* ¶ 5.160 ("[D]ynamic assessment of price developments and trends in the relationship between the prices of the dumped imports and those of domestic like products over the duration of the POI.").

62. *Id.* ¶¶ 5.154–155. The relevant text of Article 3.2 of the Antidumping Agreement reads "whether there has been a 'significant price undercutting' by the dumped imports." *Id.* ¶ 5.155.

circumstances of each case.”<sup>63</sup> Indicators that price undercutting is significant include “the nature of the product . . . how long the price undercutting has been taking place and to what extent, and . . . the relative market shares of the product types with respect to which the authority has made a finding of price undercutting.”<sup>64</sup> The relevant indicators, however, will vary from case to case.

In addition, the EU argued that MOFCOM incorrectly applied the result of the price effect evaluation to the entire domestic HP-SSST industry because the domestic industry mainly produces Grade A tubes.<sup>65</sup> The EU further argued that while foreign producers manufacture Grades B and C, any price effect on these grades in the domestic market is not indicative of a significant effect on the entire industry because the industry mainly produces Grade A tubes.<sup>66</sup> Although the Appellate Body confirmed that MOFCOM was not required to prove price undercutting for each grade, it agreed with the EU’s argument, holding that investigating authorities are required to craft results in a way that “provide[s] a meaningful basis for subsequently determining whether the dumped imports are causing injury to the domestic industry.”<sup>67</sup> Such a procedure assumes that the agency will “tak[e] into account . . . the relative market share of each product type.”<sup>68</sup> Therefore, MOFCOM’s application of price effects from two grades to the entire market was deceiving. In fact, there was only price undercutting to the segment of the Chinese market that produced Grade B and C tubes, which did not constitute a majority of the Chinese market.<sup>69</sup>

#### B. Impact Analysis

The Complainants also appealed the Panel’s decision on MOFCOM’s impact analysis. Article 3.4 describes the purpose of an impact analysis; it is a method for assessing the effects of dumping and the state of the domestic industry.<sup>70</sup> The Antidumping Agreement also lists economic indices for an investigating authority to consider in evaluating

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63. *Id.* ¶ 5.161 (“What amounts to *significant* price undercutting—that is, whether the undercutting is important, notable, or consequential—will therefore necessarily depend on the circumstances of each case.”).

64. *Id.*

65. *Id.* ¶ 5.177.

66. *Id.*; HP-SSST Panel Reports, *supra* note 42, ¶ 7.182 n.324 (“China concedes that the ‘majority’ of domestic production concerned Grade A products.”).

67. HP-SSST Appellate Body Reports, *supra* note 1, ¶ 5.180.

68. *Id.*

69. *Id.* ¶ 5.181.

70. *Id.* ¶ 5.204 (“[T]he focus of Article 3.4 is on the state of the *domestic industry*.”).

the impact.<sup>71</sup> Investigating authorities must assess each factor for an impact analysis to comply with WTO law.<sup>72</sup> The DSB also held that investigating authorities must explain in their final report which factors they deem relevant, which factors they consider irrelevant, and why.<sup>73</sup>

The Complainants' argument was that MOFCOM should have applied results gleaned in volume and price effect examinations toward its impact analysis on a segmented basis.<sup>74</sup> In other words, MOFCOM's failure to find patterns in volume and affirmative price effects for Grades B and C tubes only could only have impacted the Chinese market for Grade B and C tubes.<sup>75</sup> It was, therefore, inappropriate for MOFCOM to evaluate the impact on the entire industry. The domestic market primarily produced Grade A tubes, but importers mostly produced Grade B and C tubes. Since market share is a factor in Article 3.4, the Appellate Body found that market share was relevant as a filter for applying MOFCOM's previous findings in the volume and price portions of the investigation.<sup>76</sup>

The Appellate Body, again, reversed the Panel decision. It declared that the logical progression that runs throughout Article 3 applies to

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71. Antidumping Agreement, *supra* note 2, art. 3.4 (“The examination of the impact of the dumped imports on the domestic industry concerned shall include . . . actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments.”). China codified the factors in Article 7 of MOFCOM's Provisions on Industry Injury Investigation for Anti-Dumping Injury. *WU*, *supra* note 4, at 406 (“The examination . . . shall cover the evaluation of all relevant economic factors and indices affecting the situations of domestic industries, including sale, profits, amount of production, market share, productivity, investment/profit situation or the existing actual or potential decrease in equipment utilization rate; the factors affecting the domestic prices; the margin of dumping; and the actual or potential negative effects on cash flow, stocks, employment, salary, industrial increase, or capability in fund raising or investment.”).
72. Panel Report, *European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, ¶ 6.159, WTO Doc. WT/DS141/R (adopted Oct. 30, 2000) (“[E]ach of the fifteen factors listed in Art. 3.4 of the AD Agreement must be evaluated by the investigating authorities in each case in examining the impact of the dumped imports on the domestic industry concerned.”).
73. *Id.* ¶ 6.162 (“[E]very factor in Article 3.4 must be considered, and that the nature of this consideration, including whether the investigating authority considered the factor relevant in its analysis of the impact of dumped imports on the domestic industry, must be apparent in the final determination.”).
74. HP-SSST Appellate Body Reports, *supra* note 1, ¶ 5.195.
75. *Id.*
76. *Id.* ¶ 5.207.

Article 3.4. The Panel found that the logical progression only applied to changes in volume, price, and findings of causation, relying on the belief that volume and price should be linked to dumping through causation.<sup>77</sup> It assumed that price and volume are relevant to causation and need not be relevant to an impact analysis.<sup>78</sup> The Appellate Body determined, conversely, that volume and price should be considered in an impact analysis, reasoning that such an analysis is for the purpose of “understanding . . . *the impact of* subject imports on the basis of [volume and price].”<sup>79</sup> Ultimately, the value in Article 3’s logical progression is that it exposes “the relationship between subject imports and the state of the domestic industry.”<sup>80</sup> A logical progression encompasses Articles 3.2 and 3.4 in finding injury and ultimately that dumping caused material injury to the domestic industry.<sup>81</sup>

The Appellate Body continued by confirming that it was proper for MOFCOM to evaluate the impact of imported goods on the state of the industry.<sup>82</sup> It was not proper for MOFCOM to not take into account the market shares of the segments of the product where it has found an impact.<sup>83</sup> In other words the impact should be limited to the grade of a product where an effect is found.

### C. Causation

China appealed the Panel’s findings on causation. A causation analysis ties dumping to an injury determination.<sup>84</sup> Investigating authorities must base their causation findings on “all relevant evidence,” including information developed by assessing the factors in Articles 3.1, 3.2, and 3.4.<sup>85</sup> Investigating authorities must also eliminate nonattribution factors at this stage.<sup>86</sup> In short, governed by Article 3.5, national

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77. *Id.*

78. *Id.*

79. *Id.* ¶ 5.205 (quoting Appellate Body Report, *China—Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, ¶ 149, WTO Doc. WT/DS414/AB/R (adopted Nov. 16, 2012)).

80. *Id.* (quoting Appellate Body Report, *China—Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, ¶ 149, WTO Doc. WT/DS414/AB/R (adopted Nov. 16, 2012)).

81. *Id.* ¶ 5.209.

82. *Id.* ¶ 5.210.

83. *Id.* ¶ 5.211.

84. Antidumping Agreement, *supra* note 2, art. 3.5 (“It must be demonstrated that the dumped imports are . . . causing injury . . .”).

85. *Id.* (“The demonstration of a causal relationship . . . shall be based on an examination of all relevant evidence before the authorities.”).

86. *Id.* (“The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry,

investigators must devise a framework for reaching a conclusion on causation.

The Appellate Body rejected all of China's arguments.<sup>87</sup> MOFCOM began by contesting the Panel's findings. It argued that the Panel failed to conduct an "objective assessment" of the case.<sup>88</sup> MOFCOM's first argument contended that China acknowledged that imported HP-SSSTs constituted a large market share, even after declining from a nearly ninety percent to a fifty percent market share, and that the Panel should not have ignored that consideration.<sup>89</sup> Because China acknowledged the decrease, but maintained that the market of imported goods was still high, such a finding was consistent with its obligations to account for a downward trend.<sup>90</sup> The Appellate Body disagreed, affirming the Panel. The Appellate Body held that MOFCOM was required to ascertain a reason for the declining market share so that it could reasonably consider whether price effects were attenuated on the entire industry.<sup>91</sup> This was necessary before concluding that there was causation between price effects and domestic tubes.<sup>92</sup>

Next, China argued that it correctly assumed there was a price correlation between imported Grade B and C tubes and domestic Grade A tubes. Relying on the assumption that cross-grade price effects are implicit, China claimed that imported Grade B and C tubes had a negative cross-grade price effect on the price of Grade A tubes, even though the Grade A tube market was almost completely composed of Chinese manufacturers.<sup>93</sup> Because cross-grade price effects always exist between different grades of a product, China, allegedly, did not have to support its conclusion with evidence.<sup>94</sup> The Appellate Body rejected the second argument too, finding that countries must find cross-grade price correlations, based on objective evidence.<sup>95</sup> Once a country confirms that such a correlation exists, it must tease out the impact of the correlation.

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and the injuries caused by these other factors must not be attributed to the dumped imports.").

87. HP-SSST Appellate Body Reports, *supra* note 1, ¶ 6.

88. *Id.* ¶¶ 5.214, 5.244.

89. *Id.* ¶ 5.247.

90. *Id.*

91. *Id.* ¶ 5.248.

92. *Id.* ¶¶ 5.248–50.

93. *Id.* ¶¶ 5.216, 5.252.

94. *Id.* ¶ 5.256.

95. *Id.*

Thirdly, China contended that high-grade tubes are substitutes for low-grade tubes.<sup>96</sup> For example, Grade B and C tubes may be used in place of Grade A tubes. The Appellate Body disagreed again.<sup>97</sup> It emphasized that Grade B and C tubes are more expensive than Grade A.<sup>98</sup> Moreover, only Grade B and C tubes are suitable to be used in “ultra-supercritical boilers.”<sup>99</sup> Grade A tubes are inferior in quality and are only suitable in boilers that generate power under lower pressure.<sup>100</sup> In order to prove this claim, a respondent must investigate the extent of substitution between grades.<sup>101</sup>

Regardless of the Appellate Body’s ruling on each issue, China’s appeal on causation fails because it relied on insufficient findings of price undercutting and impact on the domestic market. As part of the logical progression of Article 3, of the Antidumping Agreement, the causation findings were premised on faulty conclusions and ultimately unsubstantiated.

### CONCLUSION

The Appellate Body’s affirmation in this case presents an interesting trend apparent in antidumping cases against China. According to work by Professor Juscelino Colares, there is a perceivable trend of bias against respondents in DSB proceedings.<sup>102</sup> According to the positive theory of litigation, court decisions should equally favor complainants

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96. *Id.* ¶ 5.252.

97. *Id.* ¶ 5.263.

98. *Id.* ¶ 5.181 (“Grade B is approximately double the price of Grade A, and Grade C is approximately triple the price of Grade A.”).

99. *Id.* ¶ 5.263.

100. *Id.* (“[H]igher-grade products B and C are capable of enduring the greater pressures and temperatures produced in ultra-supercritical boilers, and that the lower-grade product A is used in lower pressure and temperate environments in supercritical boilers.”).

101. *Id.* (“Given the considerable price and physical differences between the different product grades at issue, MOFCOM should, at the very least, have assessed the existence and the extent of substitutability of lower- and higher-end HP-SSST in order to show that ‘alleged substitutability demonstrates price correlation’ between each product type.”).

102. Juscelino F. Colares, *A Theory of WTO Adjudication: From Empirical Analysis to Biased Rule Development*, 42 VAND. J. TRANSNAT’L L. 383, 439 (2009) (“The existence of a sustained pattern of Complainant success, with win rates ranging from 83% to 91% across Case Types, constitutes a substantial deviation from the 50% success rate predicted under random litigation assumptions.”).

and respondents.<sup>103</sup> WTO members have brought antidumping cases against China on seven occasions and five have survived consultations.<sup>104</sup> China has lost all five of these cases, as a respondent.<sup>105</sup> While five cases is not a statistically significant number to prove bias, it adheres to the general theory.

In the 1980s, years before China joined the WTO on December 11, 2001, the US, the EU, Canada, and Australia brought the most antidumping cases.<sup>106</sup> Now, the top five implementers of antidumping measures include India, Argentina, Turkey, and China.<sup>107</sup> MOFCOM, between January 1995 and December 2014, conducted 218 antidumping investigations and imposed 176 antidumping duties.<sup>108</sup> Approximately 80.7% of cases led to antidumping duties. That percentage is high. Of India, Argentina and Turkey, only Turkey is higher (approx. 90.6%).<sup>109</sup>

Although the Appellate Body report and the Panel report had the same outcome, the Appellate Body reversed the Panel's holdings on price undercutting and MOFCOM's impact analysis. At least one expert suggests that *China—HP-SSST* raises the bar for investigating

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103. *Id.* at 385 (“[T]he prevailing positive theory of judicial adjudication explains that it is unlikely for a particular type of litigant to systematically prevail over time because stronger cases will settle rather than result in full adjudication.”).
104. Umair H. Ghori, *The Dumping Dragon: Analysing China's Evolving Anti-Dumping Behaviour*, 4 BUS. & MGMT. REV. 114, 119 tbl.4 (2013). The seven cases treat the Japanese and EU HP-SSST case as one. The number also updates Table 4 with one additional case since Ghori's paper was published. Request for Consultations by Canada, *China—Anti-Dumping Measures on Imports of Cellulose Pulp from Canada*, WTO Doc. WT/DS483/1 (adopted Oct. 20, 2014).
105. Ghori, *supra* note 104, at 119; HP-SSST Appellate Body Reports, *supra* note 1, ¶ 6.2.
106. JACKSON ET AL., *supra* note 3, at 836–37 (“[I]n the 1980s . . . four countries—the US, the EU, Canada and Australia were by far the major users of AD measures. . . . [S]ince 1995, the major users of AD laws are (in order): India, the US, the US, the EU, Argentina, China and Turkey.”).
107. *Id.*
108. WTO, ANTI-DUMPING INITIATIVES: BY REPORTING MEMBER 01/01/1995–31/12/2014, [https://www.wto.org/english/tratop\\_e/adp\\_e/AD\\_InitiationsByRepMem.pdf](https://www.wto.org/english/tratop_e/adp_e/AD_InitiationsByRepMem.pdf) [<https://perma.cc/W8QT-UN7A>] (last visited Mar. 7, 2016) [hereinafter WTO, BY REPORTING MEMBER]; WTO, ANTI-DUMPING MEASURES: BY REPORTING MEMBER 01/01/1995–31/12/2014, [https://www.wto.org/english/tratop\\_e/adp\\_e/AD\\_MeasuresByRepMem.pdf](https://www.wto.org/english/tratop_e/adp_e/AD_MeasuresByRepMem.pdf) [<https://perma.cc/XSV6-38G8>] (last visited Mar. 15, 2016) [hereinafter WTO, ANTI-DUMPING MEASURES].
109. WTO, ANTI-DUMPING MEASURES, *supra* note 108; WTO, BY REPORTING MEMBER, *supra* note 108. India and Argentina both impose duties in approximately 72.2% of cases. It is also much higher than the US (65.46%), the EU (63.68%), and Canada (60.7%).

authorities implementing antidumping duties.<sup>110</sup> The price undercutting procedures appear particularly suspect. Rajib Pal, of Sidley Austin Washington, D.C., proposes three hypothetical scenarios when there appears to be dumping, but the holding of *China—HP-SSST* may impede an injury finding: first, when import and domestic prices fluctuate each quarter; second when import prices are above domestic prices, then domestic prices increase and remain higher for an equivalent period of time; third, when import prices are above domestic prices, then import prices decrease so that they fall below domestic prices.<sup>111</sup> Pal explains that the ITC counts the yearly quarters for each good, then finds dumping if import prices exceed domestic prices for a greater number of quarters. He argues that *China—HP-SSST* places a greater burden on investigating authorities in the first two scenarios because dumping is most apparent when import prices dip below domestic prices.<sup>112</sup>

The second scenarios create a troubling outcome. An importing manufacturer can theoretically continue to dump goods without being identified by a price undercutting analysis. If a company wishes to dump, it could wait until prices in the foreign market increase, then by merely keeping its prices constant it could essentially dump its goods without being suspected. Given this observation the Appellate Body's holding is restrictive and in at least one way ineffectual.

There are also benefits of the new price undercutting requirements. The goal of Article 3.2 is to identify when the price of dumped foreign goods affects the price of domestic goods. While the three hypotheticals are helpful in considering American trade policy, they also demonstrate that the United States also failed to recognize the Appellate Body's understanding of price undercutting. Instead of merely comparing prices in different quarters and counting the number of times one price is higher than the other, it is important to identify trends. If an investigating authority can identify patterns, then it can understand whether there is any actual effect on the industry. For future antidumping investigations price-undercutting assessments must evolve so that they can more concretely contribute to a finding of injury on a domestic industry.

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110. Rajib Pal, *Sidley Update: WTO Appellate Body Jurisprudence has Important Implications for Injury Determinations in Trade Remedy Investigations*, SIDLEY AUSTIN LLP (Oct. 21, 2015) (arguing that *China—HP-SSST*, in light of *US—Carbon Steel*, tightens requirements on national authorities conducting dumping investigations).

111. *Id.*

112. *Id.*

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