CHINA – ANTI-DUMPING AND COUNTERVAILING DUTY MEASURES ON CERTAIN AUTOMOBILES FROM THE UNITED STATES
(DS440)

RESPONSES OF THE UNITED STATES TO THE PANEL'S SECOND SET OF QUESTIONS TO THE PARTIES

November 1, 2013

TABLE OF REPORTS

Short Form	Full Citation
EC – Fasteners (China) (AB)	Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS/397/AB/R, adopted 28 July 2011

TABLE OF EXHIBITS

Exhibit No.	Description
USA-21	Full Translation of Mercedes Benz Comments on MOFCOM Final Disclosure, April 28, 2011

ALLEGED VIOLATION OF ARTICLE 6.9 OF THE ANTI-DUMPING AGREEMENT

UNITED STATES

28. The Panel notes that Exhibit USA-20 consists of a letter dated 28 April 2011 submitted by Mercedes-Benz US International, Inc. to MOFCOM.

Without prejudice to China's objection regarding the timing of the submission of this evidence into the record, could the United States please clarify whether the English translation provided is complete? If not, could the United States please submit a full translation of this letter?

1. The United States submitted the Chinese-language version of the Mercedes Benz Comment on the Final Disclosure (obtained from MOFCOM's Reading Room in Beijing) to the Panel as Exhibit USA-20. The English translation provided with Exhibit USA-20 is a partial translation. Please see attached as Exhibit USA-21 a full translation of the Mercedes Benz Comments on the Final Disclosure.

2. China's objection regarding the timing of this submission has no merit. The United States submitted Exhibit USA-20 as rebuttal evidence. In particular, the United States submitted Exhibit USA-20 in response to China's assertions that it sent disclosure documents to the private sector respondents, including Mercedes Benz, and in these documents disclosed the essential facts.[1] Exhibit USA-20 is documentary evidence contradicting China's assertions, which China itself had failed to support with any positive evidence. In this regard, the U.S. submission of this evidence is fully consistent with paragraph 8 of the Panel's Working Procedures in this dispute, which provides that "evidence necessary for the purposes of rebuttal, answers to questions or comments on answers to questions" may be submitted later than the first substantive meeting of the Panel. Thus, the document submitted as Exhibits USA-20 and USA-21 provides additional confirmation that, contrary to China's assertions, China failed to disclose the essential facts in the form of the data and calculations underlying its dumping margin calculation, thus breaching Article 6.9 of the AD Agreement.

DETERMINATION OF "ALL OTHERS" AD AND CVD RATES

UNITED STATES

32. The Panel notes the United States' argument at paragraph 32 of its second written submission that MOFCOM "applied facts available to calculate, based on adverse facts available, an "all others" dumping margin and subsidy rate for unknown producers or exporters".[2] The Panel also notes China's argument at paragraph 31 of its oral statement at the second meeting of the Panel that the United States has not properly brought a challenge to MOFCOM's choice of facts available.

[1] *See, e.g.*, China Response to Panel question No. 6(a), para. 8.

[2] Emphasis added. See also in relation to United States' second written submission, paras. 35-36, 38, 41, 44-45, and 56.

Without prejudice to China's objection, could the United States please indicate whether its argument that MOFCOM applied adverse facts available is independent of its other arguments that MOFCOM erred in applying facts available to non-registrant producers pursuant to Article 6.8 and Annex II of the Anti-Dumping Agreement, and Article 12.7 of the SCM Agreement. In other words, does the United States expect the Panel to make a finding of violation in relation to the use of adverse facts available, independently from a finding of violation regarding the use of facts available in general?

3. The United States is not asking the Panel to make findings that MOFCOM's selection of "adverse facts available" was inconsistent with Article 6.8 and Annex II of the AD Agreement, and Article 12.7 of the SCM Agreement, independent of the arguments the United States has already presented demonstrating that China breached these provisions by resorting to adverse facts available.

4. As noted in paragraph 23 of the U.S. opening statement at the second substantive meeting of the Panel, the use of the term "adverse" refers to the fact that China inappropriately applied facts available with an adverse inference to unknown producers or exporters. Specifically, China concluded that any company that did not register to participate in the investigation failed to cooperate. Based upon that unsubstantiated conclusion, China applied an adverse dumping margin and subsidy rate to these "other" U.S. companies.

5. China addresses arguments that the United States has not raised.[3] Rather, throughout the proceeding, the United States has consistently maintained that China acted inconsistently with Article 6.8 and Annex II of the AD Agreement, and Article 12.7 of the SCM Agreement, because the unknown, (and even non-existent) "other" U.S. producers or exporters could not have been made aware of the information required as a matter of logic, and thus, cannot be said to have failed to cooperate under the covered agreements. Nowhere does China demonstrate with evidence that unknown producers or exporters refused access to or otherwise failed to provide necessary information within a reasonable period or significantly impeded the investigation.[4] And, China's notification attempts are insufficient to justify its resort to adverse facts available.[5]

6. Exemplifying China's flawed approach, China applied the "all others" AD rate to Ford "since Ford did not have any exports during the POI."[6] In other words, China applied an adverse "all others" AD rate to Ford, despite never indicating how Ford refused access to or failed to provide necessary information, and never stating that Ford significantly impeded the investigation. China did so while acknowledging that Ford could not have participated in the antidumping investigation in the first place.[7]

33. The Panel notes the United States' argument at paragraph 53 of its second written submission that "China breached Articles 12.2, and 12.2.2 by failing to explain the "all others" dumping margin in the AD determinations, as well as Articles 22.3, and 22.5 of

[3] China Second Opening Statement, paras. 31-33.
[4] *See, e.g.*, U.S. Second Written Submission, paras. 33-37; U.S. Second Opening Statement, para. 20.
[5] U.S. Second Written Submission, paras. 41-44.
[6] Final Determination, pp. 41-42 (Exhibit USA-02).
[7] U.S. Second Written Submission, para. 38.

the SCM Agreement by failing to explain the "all others" subsidy rate in the CVD determinations."

Could the United States please specify which "determination[s]" it refers to in the above statement?

7. In paragraph 53 of its second written submission, the United States specifically refers to the Final Determination (Exhibit USA-2).

DEFINITION OF DOMESTIC INDUSTRY: ALLEGED VIOLATIONS OF ARTICLES 3.1 AND 4.1 OF THE ANTI-DUMPING AGREEMENT AND ARTICLES 15.1 AND 16.1 OF THE SCM AGREEMENT

UNITED STATES

39. The Panel notes the United States' argument at paragraph 71 of its second written submission that the Panel "should consider the percentages [of total production captured by MOFCOM's domestic industry definition] in light of the process MOFCOM employed, which resulted in MOFCOM having before it data from only eight domestic producers".

Could the United States please clarify whether it argues, independently of its arguments with respect to alleged distortion as a result of self-selection, that 33.54% to 54.16% of total production does not and cannot, as a quantitative matter, satisfy the major proportion threshold in this case? If yes, please explain why.

8. Articles 3.1 and 4.1 of the AD Agreement and Articles 15.1 and 16.1 of the SCM Agreement do not establish a simple quantitative test for determining whether an investigating authority's definition of the domestic industry meets the requirements set forth in Articles 4.1 and 16.1. If that were the case, the Agreements would specify some minimum percentage of total domestic production that must be represented by the domestic industry, as defined, and that would make the task of assessing a Member's compliance with these provisions far simpler.

9. Instead, Articles 4.1 and 16.1 establish, *inter alia*, that the term "domestic industry" shall be interpreted as referring to those domestic producers whose collective output constitutes a "major proportion" of the total domestic production, and Articles 3.1 and 15.1 require that an investigating authority base its injury determination on "positive evidence" and an "objective examination."

10. The Appellate Body has explained that these provisions should be read together and that, "[n]aturally, the 'positive evidence' to be used in an injury determination requires wide-ranging information concerning the relevant economic factors in order to ensure the accuracy of an investigation concerning the state of the industry and the injury it has suffered."[8] The Appellate Body has also indicated that "'a major proportion of the total domestic production' should be determined so as to ensure that the domestic industry defined on this basis is capable of

[8] *EC – Fasteners (China) (AB)*, para. 413 (emphasis added).

providing ample data that ensure an accurate injury analysis"[9] and "a major proportion" should be properly understood as constituting "a relatively high proportion of the total domestic production."[10]

11. Read together, Articles 3.1 and 4.1 and 15.1 and 16.1 require that an investigating authority define the domestic industry on a case-by-case basis, taking into account the particular facts of the industry under investigation, in light of the need to collect sufficient evidence in order to make a determination that is based on positive evidence, and utilizing a process that is objective and not biased in favor of any interested party or group of interested parties.

12. When assessing whether MOFCOM's definition of the domestic industry in the underlying investigations is consistent with the requirements of the Agreements, it certainly is appropriate to take into account the actual, numerical percentages of total domestic production represented by the producers in the domestic industry as MOFCOM defined it; those percentages were not relatively high. At the same time, it is important to consider the process MOFCOM employed, the absence of any discussion by MOFCOM in the final determination of the nature and composition of the auto industry in China, and the absence of any discussion by MOFCOM of why it could not seek additional information.

13. Accordingly, the United States is not arguing "independently" that 33.54 percent to 54.16 percent of total production does not and cannot, as a quantitative matter, satisfy the major proportion threshold. Rather, all of our arguments – relating to the relatively low percentages, MOFCOM's flawed process, and MOFCOM's failure to offer any justification for the relatively low percentages in the final determination – taken together support the U.S. claims that MOFCOM's definition of the domestic industry does not meet the requirements of Articles 4.1 and 16.1, and therefore China has breached Article 3.1 of the AD Agreement and Article 15.1 of SCM Agreement.

40. The Panel notes the United States' argument in its responses to Panel questions that "in addition to the breach that results from its failure to define the domestic industry as producers representing a major proportion of domestic production, as set out in Articles 4.1 and 16.1, China separately breached its obligations under Articles 3.1 and 15.1 by defining the domestic industry as comprising only those producers who supported the petition."[11]

Does the United States expect a finding from the Panel on alleged violations of both Articles 4.1 and 16.1 and Articles 3.1 and 15.1, or just a finding of violation of Articles 3.1 and 15.1? If the United States expects a finding of violation of both sets of provisions, could the United States please clarify if it is arguing that there is some difference in the alleged breach of obligations under Article 3.1 of the Anti-Dumping Agreement and Article 15.1 of the SCM Agreement and the alleged breach of obligations under Article 4.1 of the Anti-Dumping Agreement and Article 16.1 of the SCM Agreement?

[9] *EC – Fasteners (China) (AB)*, para. 413 (emphasis added).
[10] *EC – Fasteners (China) (AB)*, paras. 412, 419 (emphasis added).
[11] United States' response to Panel question No. 14.

14. The United States has established that MOFCOM's domestic industry definition did not include a major proportion of the total domestic production of certain automobiles and it was distorted because of MOFCOM's flawed process.[12] Accordingly, for the reasons we have given previously, the United States respectfully requests that the Panel find that China breached Article 3.1 of the AD Agreement, as read together with Article 4.1 of the AD Agreement, and Article 15.1 of the SCM Agreement, as read together with Article 16.1 of the SCM Agreement.

15. Article 4.1 of the AD Agreement and Article 16.1 of the SCM Agreement set forth definitions of the term "domestic industry." Given that these provisions are definitions, and standing alone do not directly impose obligations, the United States is not requesting that the Panel find that China separately breached those provisions.

[12] *See* U.S. First Written Submission, paras. 105-125; U.S. First Opening Statement, paras. 46-69; U.S. response to Panel question No. 14, paras. 26-27; U.S. Second Written Submission, paras. 59-74; U.S. Second Opening Statement, paras. 32-47.