CHINA – MEASURES IMPOSING ANTI-DUMPING DUTIES ON HIGH-PERFORMANCE STAINLESS STEEL SEAMLESS TUBES ("HP-SSST") FROM JAPAN
(WT/DS454)

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(WT/DS460)

INTEGRATED EXECUTIVE SUMMARY OF THE UNITED STATES OF AMERICA

March 21, 2014

I. PROCEDURAL AND TRANSPARENCY REQUIREMENTS OF GATT ARTICLE 6

a. Designation of Confidential Information and Requirement for Public Summaries under Articles 6.5 and 6.5.1 of the AD Agreement

1. A basic tenet of the AD Agreement, as reflected in various Article 6 provisions, is that the parties to an investigation must be given a full and fair opportunity to see relevant information and to defend their interests. At the same time, investigative authorities may need to protect confidential information. Indeed, in AD investigations, the submission of confidential information is a necessary and frequent occurrence. Article 6.5 thus requires that investigating authorities, upon good cause shown, to ensure the confidential treatment of such information. Article 6.5.1 balances the need to protect such information against the disclosure requirements of other Article 6 provisions. It provides that an investigating authority, if it accepts confidential information, must provide or otherwise assure that confidential information is summarized in sufficient detail to permit a reasonable understanding of the substance of the information. Where an investigating authority accepts confidential information without providing or otherwise assuring timely adequate non-confidential summaries of that information, significant prejudice to the ability of companies and Members to defend their interests could occur.

b. Acceptance of Certain Information Presented during Verification

2. The main purpose of "on-the-spot investigation" conducted pursuant to AD Article 6.7 is to verify the information already submitted or obtain further detail. On-the-spot investigations are not opportunities for interested parties to submit a significant amount of new information.

3. The United States notes that Paragraph 7 of Annex I provides that a firm is entitled to prepare for the on-the-spot investigation and contemplates that an investigating authority may request that a firm provide additional information, including potentially minor corrections or clarifications to information already submitted.

4. With respect to what must be accepted by the investigating authority, Article 6.8 and Annex II provide that an investigating authority may make determinations on the basis of facts available when information is not submitted in a reasonable time. The investigating authority is not required to use information in circumstances including when the information is submitted in an untimely fashion and when its acceptance would cause difficulties in the conduct of the investigation. Accordingly, whether any information proffered at verification should be accepted will be a fact-specific inquiry.

c. Alleged Inadequate Disclosure and Failure to Inform Parties of the Essential Facts under Consideration in Violation of AD Articles 6.4 and 6.9

5. The United States recalls that the "relevancy" of the information covered by Article 6.4 is to be determined from the perspective of the interested party, not the investigating authority. The United States agrees with the EU that Article 6.4 generally requires that an investigating authority give interested parties access to all non-confidential information that is submitted during an investigation. The United States agrees that there is no "disclosure" of confidential

information within the meaning of Article 6.5 if the investigating authority is providing the confidential information only to the party that submitted it. To the extent that there may be aspects of the calculation that may not be able to be disclosed because they contain another interested party's confidential information, the second clause of Article 6.4 explicitly excludes from the disclosure requirements such information treated as confidential under Article 6.5.

6. With respect to Article 6.9, the United States notes that the calculations relied on by an investigating authority to determine the normal value and export prices, as well as the data underlying those calculations, constitute "essential facts" forming the basis of the investigating authority's imposition of final measures. Without such information, no affirmative determination could be made and no definitive duties could be imposed. If the interested parties are not provided access to these facts used by the investigating authority on a timely basis, they cannot defend their interests.

7. Furthermore, with respect to the determination of the existence and margin of dumping, the investigating authority must disclose the data used in: (1) the determination of normal value (including constructed value); (2) the determination of export price; (3) the sales that were used in the comparison between normal value and export prices; (4) any adjustments for differences which affect price comparability; and (5) the formulas that were applied to the data. All of these would be "essential" facts within the meaning of Article 6.9.

8. Contrary to China's arguments, the fact that a party has provided information to the investigating authority does not mean that the exporter knows with certainty which of that information will be used and in what capacity. Moreover, China's claim that all that is required is a summary of the essential facts is a misreading of Article 6.9, which require that an investigating authority provide the essential facts underlying its determination and not merely a stated conclusion based on these facts.

9. For injury determination, the United States notes that Article 6.9 considers information on the price levels for domestically produced products and comparison between the prices for this product and the imports under consideration to be essential facts for price effect findings.

d. Use of Facts Available to Determine the Dumping Margins with respect to All Other Companies in Alleged Breach of Article 6.8 and Paragraph 1 of Annex II

10. The United States recalls that Article 6.8 establishes that an investigating authority may only resort to facts available where an interested party "refuses access to" or otherwise "does not provide" information that is "necessary" to the investigation, or otherwise "significantly impedes" the investigation. An investigating authority may not assign a margin based on facts available when the authority has not requested the information in the first place. Thus, an exporter must be given the opportunity to provide information required by an investigating authority before the latter resorts to facts available. An exporter that is unknown to the investigating authority is not notified of the information required, and thus is denied an

opportunity to provide it. In other words, exporters not given notice of the information required of them cannot be considered to have failed to provide necessary information.

11. Article 6.8 should be read together with paragraph 1 of Annex II, which requires investigating authorities to ensure that respondents receive proper notice of the rights of the investigating authorities to use facts available. These provisions together ensure that an exporter or producer has an opportunity to provide information required by an investigating authority before the latter resorts to the use of facts available.

II. ALLEGED FAILURE TO SET FORTH OR OTHERWISE MAKE AVAILABLE IN SUFFICIENT DETAIL CERTAIN FINDINGS AND CONCLUSIONS WITH RESPECT TO THE ALL OTHERS RATE AND THE INJURY DETERMINATION IN VIOLATION OF AD ARTICLES 12.2 AND 12.2.2

12. With respect to the dumping determination, Article 12.2 provides that, in a preliminary or final determination, the investigating authority must provide notice or a separate report setting out "in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities." Article 12.2.2 further provides that for a final determination, an investigating authority's final report must detail "all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures."

13. The factual and legal bases for the investigative authority to resort to facts available with respect to all other exporters that it did not examine constitute material issues of fact and law considered. These issues go to the very heart of the determination of what margin to apply to unexamined exporters. Consequently, Article 12.2 requires that the investigative authority provide in sufficient detail the findings and conclusions that lead to application of facts available. Similarly, Article 12.2.2 requires, among other things, the that the investigative authority provide "all relevant information" on the relevant facts underlying its determination that recourse to facts available was warranted in the calculations of the "all others" rate.

14. With respect to the injury determination, the United States notes the that, pursuant to Article 12.2.2, any facts related to the price comparisons of the subject imports and domestic products are relevant information on the matters of fact that an investigating authority should disclose in its final determination.

III. ALLEGED BREACH OF ARTICLE 2 OF THE AD AGREEMENT IN THE CALCULATION OF DUMPING MARGINS

a. Determinations of SG&ACosts Should be Based, Whenever Possible, on Sales Made in the Ordinary Course of Trade Pursuant to AD Article 2.2.2

15. Article 2.2.2 provides that an investigating authority should, where possible, base SG&A and profit on sale of the like product made in the ordinary course of trade. If, and only if, such

sales in the ordinary course of trade are unavailable, Article 2.2.2 then provides alternative methodologies for determining SG&A and profit.

16. The EU argues that MOFCOM breached Article 2.2.2 because it based SG&A on certain sample sales and these sales were outside the ordinary course of trade. However, there are many reasons to find a normal value sales transaction not in the ordinary course of trade. The AD Agreement does not require an investigating authority to treat all sample sales as outside the ordinary course of trade. Instead, the investigating authority must evaluate the record evidence to determine whether it supports finding that the sample sale was concluded on terms and conditions that are incompatible with normal commercial practice for sales of the like product, in the market in question, at the relevant time.

b. Investigating Authorities Shall Normally Calculate Cost on the Basis of Records Kept by the Exporters When the Costs are in Accordance with Generally Accepted Accounting Principles (GAAP) and Reasonably Reflect Cost Pursuant to AD Article 2.2.1.1

17. The United States considers Article 2.2.1.1 to require an investigating authority to normally calculate costs on the basis of records kept by an exporter or producer's books and provided that the books and records are in accordance with the GAAP of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration. If the evidence in this dispute establishes that the records were in accordance with GAAP and reasonably reflected the costs associated with the production and sale of the product under consideration, MOFCOM would have been obligated to use those records pursuant to Article 2.2.1.1 or obligated to provide a reason supported by the record evidence to depart from the "normal" methodology provided for in Article 2.2.1.1.

c. An Investigating Authority Should Conduct Model Matching to Ensure a Fair Comparison Pursuant to AD Article 2.4

18. Article 2.4 sets forth the overarching obligation of an investigating authority to make a "fair comparison" between the export price and the normal value when determining the existence of dumping and calculating a dumping margin. A fair comparison requires the investigating authority to strive to compare similar products as well as transactions. In finding the correct set of products to compare, the investigating authority must conduct an exercise such as a model matching exercise. When subject merchandise consists of two or more significantly diverse product models, investigating authorities will match foreign-like products and home-market products using model match criteria to assure accurate price comparisons within but not across relevant product categories. Because model matching ensures that only sales of products with similar physical characteristics are compared to each other or necessary adjustments for the differences are made, some sort of model matching exercise is an essential component of establishing a fair comparison.

19. Generally, the investigating authority has the obligation to seek information regarding differences in physical characteristics that may affect price comparability in order to make a fair comparison. The investigating authority can fulfill this obligation by asking parties to: 1) identify and explain the differences in physical characteristics and 2) identify which of those differences in physical characteristics may affect price comparability. If an investigating authority sought such information, but an exporter or producer merely identified differences in physical characteristics between the products at issue without claiming that those differences affected price, then the investigating authority need not independently undertake an analysis of the differences in physical characteristics to determine whether they affected price comparability.

IV. INJURY DETERMINATION

a. Evaluation of the Margin of Dumping

20. The United States notes that Articles 3.1 and 3.4 do not require an authority to evaluate the *significance* of dumping margins. Neither article requires that the magnitude of the margins of dumping be given any particular weight, or that they be evaluated in any particular way.

b. Import Volumes and Causation Determinations

21. With regard to Article 3.2, the United States disagrees with EU and Japan to the extent they assert that an authority may not attach significance to the fact that imports "retain" a significant share of the market over the period. Although Article 3.2 does specify that an authority "shall consider whether there has been a significant increase in dumped imports," either on an absolute or relative basis, it does not expressly or implicitly prevent an authority from considering in its analysis the fact that imports have a significant market share level. In a situation in which significant volumes of subject imports are having a significant adverse impact on domestic prices, the existence of significant import volumes or market share is obviously one item of "relevant evidence" that an authority may want to consider in its Article 3.5 analysis.

c. Application of Provisional Measures for a Period Exceeding Four Months

22. The text of Article 7.4 provides that without request from a sufficient percentage of exporters or the imposition of a lesser duty, an investigating authority may not impose provisional measures for a period exceeding four months. To the extent that MOFCOM applied provisional measures for six months without a request by exporters representing a significant percentage of the trade involved and without MOFCOM examining whether a duty lower than the margin of dumping would be sufficient to remove injury, the United States agrees that China breached Article 7.4.

d. The EU's Proposed Amendments to the BCI Procedures and the Request that the Panel Seek Confidential Information Pursuant to DSU Article 13.1

23. Article 6.5 expressly provides that, once an investigating authority accepts information as confidential, the investigating authority must not disclose such information without the specific permission of the party submitting it. No provision of the AD Agreement or the DSU creates an exception that would permit information that the investigating authority accepted as confidential in the underlying investigation be disclosed within the context of a WTO proceeding without the specific permission of the party submitting that information to the investigating authority.

24. Protecting confidential information, including by securing the specific permission of the party submitting the information, is crucial to the proper functioning of trade remedy proceedings. If the protections in Article 6.5 were treated as non-applicable in the context of a dispute, parties could be deterred from disclosing confidential information to investigating authorities, potentially impeding or frustrating the proceeding. It is also important to recognize that confidential information often raises significant domestic sensitivities. For example, in order to ensure confidential information stays properly protected, consistent with WTO obligations, Members may have domestic legal provisions that impose penalties, including criminal penalties, on government officials that disclose such information without authorization. The Panel should not request that a party supply BCI information from the underlying proceeding absent the specific permission of the party that submitted it.

V. THE PANEL'S TERMS OF REFERENCE

a. Sufficiency of a Panel Request Assessed in Light of the Disclosure Afforded to the Interested Member and the Discussion during the Administrative Proceedings

25. The level of disclosure provided in the underlying proceeding can affect the sufficiency of a complaining Member's panel request. Compliance with DSU Article 6.2 requires a case-by-case analysis, considering the request "as a whole, and in light of the attendant circumstances." Such circumstances would include the level of disclosure provided in the underlying proceeding.

26. In contrast, the United States disagrees that the sufficiency of a panel request must be assessed in the light of the discussion between the investigating Member and the interested party during the administrative proceedings, as reflected in the measure at issue. The argumentation at the administrative proceeding level is not relevant in evaluating the sufficiency of a panel request. Using the issues raised before the investigating authorities during the administrative proceedings would be contrary to DSU Article 6.2, which requires a Member to present the problem clearly to the responding party and other Members (including those deciding whether to become third parties). It is not enough that a Member is aware of the possible universe of issues which may be raised as claims before a panel; the specific issue must be made clear in the panel request. A responding party and other Members are entitled to a clear presentation of the problem. They are not required to guess.