EUROPEAN COMMUNITIES – DEFINITIVE ANTI-DUMPING MEASURES ON

CERTAIN IRON OR STEEL FASTENERS FROM CHINA – RECOURSE TO ARTICLE 21.5 OF THE DSU BY CHINA

(DS397)

THIRD PARTY SUBMISSION OF

THE UNITED STATES

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US – Hot-Rolled Steel (AB)	Appellate Body Report, *United States – Anti-dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001

I. Introduction

1. The United States makes this third party submission to provide the Panel with its view of the proper legal interpretation of certain provisions of the Agreement on Implementation of Article VI of the *General Agreement on Tariffs and Trade 1994* (the "AD Agreement") that are relevant to China's claims in *European Communities – Definitive Anti-dumping Measures on Certain Iron or Steel Fasteners from China* (*EC – Fasteners 21.5*) (DS397). The United States thanks the Panel for the opportunity to provide comments in this dispute.

II. Background

2. In the above-referenced dispute, China argues that measures taken by the European Union (EU) to comply with recommendation and rulings of the Dispute Settlement Body ("DSB") in *European Communities – Definitive Anti-dumping Measures on Certain Iron or Steel Fasteners from China* (*EC – Fasteners)* are inconsistent with certain provisions of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "AD Agreement") and the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994").

3. In the original antidumping investigation, the European Union had requested the respondents to provide information on the investigated products to be reported on the basis of categories defined by Product Control Numbers ("PCNs"). The PCNs were made up of six elements: type of fasteners (by CN code); strength/hardness; coating; presence of chrome on coating; diameter and length/thickness. The EU also selected India as an "analog country," and requested information from an Indian producer, Pooja Forge. The analog country information was also requested on a PCN basis. The Indian producer, however, did not provide its domestic sales and costs under these PCNs. In these circumstances, the European Union resorted to the use of "product types" defined by two factors only: strength class (an original PCN category) and the distinction between standard and special fasteners. According to China: "[t]he distinction between special and standard fasteners was introduced late in the proceeding after the questionnaire responses had already been submitted and on-the-spot verifications had been carried out. The price comparison for the dumping determination was thus made on the basis of 'product types' grouping together large numbers of different fasteners having different physical characteristics."[1] China argued that the European Union had failed to explain how the product types were established or the relevant characteristics of those product types, and, without knowing what types or groups of products of Pooja Forge were actually matched with the Chinese products, the Chinese producers were denied a meaningful opportunity to comment on the normal value determination.[2]

4. The Panel and the Appellate Body found that the European Union breached Article 6.4 of the AD Agreement because, by failing to disclose information regarding the product types, the European Union failed to provide a timely opportunity for the Chinese interested parties to see information pertaining to the basis on which the Commission made the comparison of normal

[1] *See* China's First Written Submission, para. 55.

[2] *See generally* China's First Written Submission, paras. 54-60.

value and export price. The Panel also found that the European Union denied the Chinese interested parties a "full opportunity for the defence of their interests", in breach of Article 6.2 of the AD Agreement. The Appellate Body rejected the European Union's appeal of these findings. In addition, the Appellate Body reversed the Panel's findings that the European Union did not breach Article 2.4 of the AD Agreement stating that "the Panel analysed China's claim under Article 2.4 in isolation from its analysis under Article 6.4 of the [AD Agreement]."[3]

5. The European Union conducted a review investigation in which it purported to comply with the DSB's findings regarding Articles 6.4, 6.2 and 2.4 of the AD Agreement. During the review investigation the EU continued to divide the product into two separate product types: special and standard fasteners. However, within each product type, the European Union further defined six separate product characteristics: coating, chrome, type of fastener, strength, diameter, and length. China raises various issues with respect to these product characteristics and the underlying record evidence. As described below, China claims that the European Union's implementation of the DSB's findings are inconsistent with Articles 2.4, 6.2, 6.4, and 6.5 of the AD Agreement.

III. China's Claims Under Article 6 of the AD Agreement

6. China claims that the EU measure taken to comply is inconsistent with disclosure and procedural requirements found in Article 6 of the AD Agreement. While the United States takes no position on the merits of China's factual allegations, we respectfully request the Panel take into account the following points regarding the interpretation of Article 6 of the AD Agreement.

A. Article 6.5

7. China claims that the European Union breached Article 6.5 when it granted confidential status to information from the Indian analogue producer, that was (1) not "confidential by nature" and was not submitted on a confidential basis and (2) for which no demonstration of "good cause" was made. Specifically, China argues that the EU Commission improperly granted confidential treatment to information concerning the list of products sold by Pooja Forge in India's domestic market and the characteristic of those products (i.e., strength class, type of coating, diameter, length, etc.)[4]

8. Article 6.5 states:

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[3] *See* China's First Written Submission, paras. 61-63.

[4] *See* China's First Written Submission, 53.

> Any information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom that person acquired the information), or which is provided on a confidential basis by parties to an investigation shall, upon good cause shown, be treated as such by the authorities. Such information shall not be disclosed without specific permission of the party submitting it.

9. The United States disagrees with China's assertion that that "information routinely provided to potential customers…*cannot* be by nature confidential," as a categorical matter, for purposes of Article 6.5 (emphasis added).[5] China's position is not supported by the text of Article 6.5. The article is clear in stating that information is "by nature confidential" where, inter alia, "disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information…" The text of the provision contains no carve out, as China proposes, for confidential information provided to potential customers. Indeed, the United States can envision commercial scenarios where proprietary information is routinely provided to potential customers, perhaps with the proviso that the information not be further disclosed by the recipient.

10. The United States, however, take no position on whether, based on the circumstances in the anti-dumping proceeding, the information submitted by the Indian producer was protected from disclosure under Article 6.5.

B. Article 6.5.1

11. China also claims that the EU investigating authorities breached Article 6.5.1 by failing to arrange for the provision of non-confidential summaries of the purportedly confidential information submitted by the Indian producer.

12. Article 6.5.1 states:

> The authorities shall require *interested parties* providing confidential information to furnish non-confidential summaries thereof. These summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. In exceptional circumstances, such parties may indicate that such information is not susceptible of summary. In such exceptional circumstances, a statement of the reasons why summarization is not possible must be provided. (emphasis added.)

13. The first sentence of Article 6.5.1 makes clear that the requirement to "furnish non-confidential summaries" applies *only* to information submitted by "interested parties." China, however, has not established that Pooja Forge is an "interested party" for purposes of the AD Agreement.

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[5] China's First Written Submission, 106.

14. The phrase "interested parties" is expressly defined in Article 6.11 of the AD Agreement. The definition set forth in Article 6.11 applies to the AD Agreement *as a whole*, including therefore to Article 6.5.1.

15. Specifically, Article 6.11 states "For the purposes of this Agreement, "interested parties" shall include:

> (i) an exporter or foreign producer or the importer of a product subject to investigation, or a trade or business association a majority of the members of which are producers, exporters or importers of such product;
>
> (ii) the government of the exporting Member; and
>
> (iii) a producer of the like product in the importing Member or a trade and business association a majority of the members of which produce the like product in the territory of the importing Member.

16. Pooja Forge does not fall under any of the "interested party" categories listed in Article 6.11. That is, Pooja Forge is (i) not an exporter or foreign producer of the project subject to investigation, (ii) not the government of the exporting Member (i.e., China), and (iii) does not reside in the territory of the imported Member (i.e., in the EU). Moreover, in its submission China made no attempt to establish that Pooja Forge met the definition of "interested party" as defined in Article 6.11.

17. Therefore, because Pooja Forge does not appear to be an "interested party" for purposes of the AD Agreement, the United States disagrees with China's assertion that the European Union was obligated, by virtue of Article 6.5.1, to require that Pooja Forge furnish non-confidential summaries of information submitted to the EU Commission.

C. Articles 6.2 and 6.4

18. China clams that the EU breached Articles 6.2 and 6.4 because the EU Commission did not provide the Chinese exporters under investigation opportunities to see the list of products sold by Pooja Forge that the Commission used in the calculation of normal value. China also claims that by not providing such information, the EU breached Article 6.2, because the EU Commission's failure to provide such information deprived Chinese exporters of the ability to defend their interests during the antidumping investigation.

19. Article 6.2 provides:

> Throughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests. To this end, the authorities shall, on request, provide opportunities for all interested parties to meet those parties with adverse interests, so that opposing views may be presented and rebuttal arguments offered. Provision of such opportunities must take account of the need to preserve confidentiality and of the convenience to the parties. There shall be no obligation on any party to attend a meeting, and failure to do so shall not be prejudicial to

> that party's case. Interested parties shall also have the right, on justification, to present other information orally.

20. Article 6.4 of the AD Agreement provides:

> The authorities shall whenever practicable provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases, that is not confidential as defined in paragraph 5, and that is used by the authorities in an anti-dumping investigation, and to prepare presentations on the basis of this information.

21. In an antidumping investigation, the ability of an interested party to defend its interests is especially critical with respect to information related to the calculation of normal value and the price comparisons that are conducted. The United States thus agrees with the Appellate Body's decision in *EC – Pipe Fittings*, where the Appellate Body recognized that the relevancy of information covered by Article 6.4 is to be determined from the perspective of the interested parties, not the investigating authority.[6]

22. Accordingly, Article 6.4 generally requires that an investigating authority give interested parties access to *all* non-confidential information submitted during an investigation that an interested party could view as relevant to the presentation of their positions or the outcome of the investigation.[7] Failure to provide such access is not only inconsistent with Article 6.4, but also Article 6.2, because without access to information described in Article 6.4, interested parties are necessarily denied "a full opportunity for the defense of their interests."[8]

23. As stated above, the United States takes no position on whether the information at issue was properly accorded confidential treatment under Article 6.5. To the extent that confidential treatment was not properly accorded, the United States is of the view that the EU Commission was obligated, under Article 6.4, to make such information available to Chinese exporters during the review investigation, and in a timely fashion. On the other hand, if the information from the Indian producer was properly accorded confidential treatment under Article 6.5, Article 6.4 would not require disclosure of such information.

24. Nonetheless, even if the information provided by the Indian producer could not be disclosed in full, this does not mean that the EU Commission could conduct an investigation in a manner that completely denied the respondents any opportunity to participate meaningfully in the investigation or to defend their interests as contemplated in Article 6.2 of the AD Agreement. The United States recalls that it was the choice of the EU Commission to rely on confidential

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[6] *See EC – Pipe Fittings (AB),* para. 146

[7] China First Written Submission, para. 546-593

[8] *See EC – Pipe Fittings (AB),* para. 149.

information from a party that was not an "interested party" under Article 6.11.[9] If the EU decided to rely on such information, and if access to such information was necessary for the respondents to participate meaningfully or defend their interests in the investigation, the United States understands Article 6.2 to require that an authority adopt some sort of mechanism that would allow the respondents an opportunity to do so.[10] .

D. Article 6.1.2

25. China claims that by failing to ensure that the evidence presented by Pooja Forge concerning its products was made available promptly to the Chinese exporters participating in the investigation, the EU breached Article 6.1.2 of the AD Agreement.

26. Article 6.1.2 states:

> Subject to the requirement to protect confidential information, evidence presented in writing by one interested party shall be made available promptly to other interested parties participating in the investigation.

27. The United States believes that transparency is a key principle reflected in the provisions of the AD Agreement, including Article 6.1.2. Accordingly, the United States is of the view that transparency is best ensured by requiring all non-confidential information presented to, or obtained by an investigating authority to be on the record of antidumping proceedings, should be made available to all interested parties..

28. The United States, however, disagrees with China's further suggestion that where a party presents evidence to an investigating authority that party is, *ipso facto*, an "interested party" for purposes of Article 6.1.2. Specifically, China argues that Pooja Forge "should be regarded as an 'interested party' for purposes of Article 6.1.2" *because* Pooja Forge submitted evidence used by the EU Commission during the antidumping investigation.

29. As discussed above, however, the phrase "interested parties", is expressly defined in Article 6.11 of the AD Agreement. Simply put, a "party that provides information to investigating authorities" is *not* among the list of "interested parties" listed in Article 6.11.[11]

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[9] Such confidential information, as noted above, is not subject to the Article 6.5.1 requirement that interested parties submit non-confidential summaries.

[10] For example, perhaps the Commission could have provided its own summary of the information obtained from the Indian producer, or could have disclosed the information under a narrowly-drawn protective order (see AD Agreement, note 17). .

[11] Specifically, Article 6.11 states "For the purposes of this Agreement, "interested parties" shall include:

> (i) an exporter or foreign producer or the importer of a product subject to investigation, or a trade or business association a majority of the members of which are producers, exporters or importers of such product;
>
> (ii) the government of the exporting Member; and

Thus, the fact that a party provides information to an investigating authority does not *ipso facto* render said party an "interested party" for purposes of the AD Agreement.

30. China argues that "the mere fact that a participant, such as Pooja Forge…is not in one of the categories listed in Article 6.11 does not mean that it may not be treated as an "interested party" by an investigating authority.[12] But the language of Article 6.11 provides that an investigating authority has the *discretion* to extend interested party status to entities that fall outside the enumerated list of the provision. Neither the language of Article 6.11, nor the Appellate Body interpretations cited by China can be understood to mandate the grant of interested party status on entities that fall outside the enumerated list of interested parties set forth in Article 6.11.

IV. China's Claims under Article 2 of the AD Agreement

31. China claims that the EU is in breach of certain obligations that pertain to the determination of normal value under Article 2.4 of the AD Agreement. Without taking a position on the merits of China's factual allegations, the United States respectfully requests the Panel to take into account the following interpretive points in assessing the claims of China under Article 2 of the AD Agreement.

32. China makes several claims with respect to Article 2.4 of the AD Agreement.

A. Claim that European Union failed to provide relevant information regarding the products of the Indian analogue producer

33. China claims that the EU breached Article 2.4 because the EU Commission failed to provide Chinese exporters with relevant information on the characteristics of the products of Pooga Forge that the Commission used in determining normal value during the review investigation. In the review investigation, the EU initially clarified that, for the purpose of the dumping margin determination, it had grouped products according to the distinction between standard and special fasteners and the strength class. According to China, however, the EU did not provide any further information regarding the products of the Indian producer, and rejected repeated requests from the Chinese producers for more information on the characteristics of the products sold by the Indian producer.[13]

34. Article 2.4 of the AD Agreement sets forth the 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. In doing so, Article 2.4 provides that, "[d]ue allowance shall be made in each case, on its merits, for differences which affect price

(iii) a producer of the like product in the importing Member or a trade and business association a majority of the members of which produce the like product in the territory of the importing Member.

[12] China First Written Submission, 159.

[13] *See* China's First Written Submission, paras. 183-186.

comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability." Here, China's claims appear to be addressed to differences in physical characteristics that affect price comparability.

35. In this dispute, the investigating authority was using products from an analog country market to determine normal value. In this instance, a "fair comparison" for purposes of Article 2.4 requires that the investigating authority make due allowances for physical differences that affect price comparability between products from the analog country and products from the exporting country. A fair comparison with respect to physical characteristics is facilitated where sales of the exported products are matched with identical or similar product models in the comparison-market. This model-matching exercise ensures that only sales of products with similar characteristics are compared to each other and/or that necessary adjustments for the differences are accounted for.

36. The United States understands Article 2.4 as generally obligating an investigating authority to solicit information regarding what differences in physical characteristics affect price comparability. The investigating authority can fulfill this obligation by asking interested 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. Taking into consideration the responses the parties provide and the investigating authority's own analysis of the record evidence, the investigating authority may then develop appropriate product comparison criteria for the dumping margin calculation.

37. An investigating authority must exercise transparency with respect to the products used in the determination of normal value, the considered physical differences between those products, and how those differences informed investigating authority's determination of price comparability and ultimately normal value. This transparency obligation is found in the provisions of Article 6 of the AD Agreement, and is reinforced by the last sentence of Article 2.4. That sentence states: "The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties". The United States understands that transparency within the confines of Article 2.4 requires an investigating authority to provide the necessary information regarding the products and transactions at issue so that the parties can provide relevant information and argument in response. Failure to ensure transparency in this context could prevent an interested party from being able to meaningfully defend its interest.

38. The United States therefore agrees with the statement of the Panel and Appellate Body in this dispute that "without knowing what constituted product types, it would be difficult if not impossible, for foreign producers to request adjustments that they consider necessary in order to ensure a fair comparison."[14]

[14] *See EC – Fasteners (AB)*, para. 498 (citing *EC – Fasteners (Panel)*, para. 7.491).

39. The United States takes no position on the merits of China's factual allegations regarding appropriate adjustments for physical differences, and on whether the EU Commission indicated to the interested parties the information necessary to ensure a fair comparison. However, to the extent that the EU Commission, as alleged, has not provided Chinese exporters with information on the full range of product characteristics considered in the Commission's assessment of price comparability, the United States finds it difficult to see how the Commission could have met its obligation to conduct a fair comparison with respect to physical differences, and the Commission would seem to be in breach of its obligation under the last sentence of Article 2.4.

B. Claim that the European Union improperly grouped standard and special fasteners in its determination of normal value.

40. China claims that the European Union acted inconsistently with Article 2.4 in failing to ensure that the export price of standard fasteners was not compared to the normal value of special fasteners.

41. Specifically, China claims that as far as the difference between standard and special fasteners is concerned, the "grouping" was not done properly. In particular, China alleges

(I) the European Union failed to ensure that fasteners destined for high-end applications but not made according to a customer drawing were considered as "special" fasteners and not as "standard" fasteners;

(II) a reasonable and objective investigating authority could not conclude that the lists of standard and special fasteners provided by Pooja Forge was accurate.[15]

42. China further alleges that, in response to claims by the interested parties during the review investigation that the criteria for the distinction between standard and special fasteners was unclear, the European Union provided conflicting information, and rejected repeated requests from the Chinese producers for more information on the characteristics of the products sold by the Indian producer.[16]

43. As stated above, Article 2.4 requires an investigating authority to provide the necessary information regarding the products and transactions at issue so that parties can provide relevant information and argument in response. Specifically, the last sentence of Article 2.4 states that, "authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison…"). The Appellate Body in this case interpreted the last sentence of Article 2.4 as:

> impos[ing] "an obligation on the investigating authority to tell the parties what information the authority will need in order to ensure a fair comparison. Thus whereas exporters may be required to 'substantiate their assertions concerning adjustments,' the last sentence of 2.4 requires that investigating authorities to

[15] *See* China's First Written Submission, paras. 253-299.

[16] *See* China's First Written Submission, paras. 226-252.

> 'indicate to the parties' what information these request should contain, so that the interested parties will be in a position to make a request for adjustments.[17]

44. It naturally follows that an investigating authority should communicate "the necessary information" to parties in a clear manner. An investigating authority's failure to ensure clarity, and therefore transparency, with respect to the information at issue could prevent an interested party from being able to meaningfully defend its interest.

45. The United States takes no position of the merits of China's factual allegations. The United States, however, does understand that a mere statement by an investigating authority that a certain product grouping is defined the same in both markets, without providing further information, is likely to be inconsistent with the requirements of Article 2.4. In addition, without knowing the details of the comparison product, the party may have no way of knowing whether a standard product (or special product) in the export market is defined under the same parameters as a standard product (or special product) in the comparison market.

C. Claim that the European Union failed to make warranted adjustments for differences that affected price comparability

46. China claims that the EU acted inconsistently with Article 2.4 of the AD agreement and VI:1 of the GATT 1994 by failing to make allowances for differences affecting price comparability, including differences in taxation and import duties.

47. Article 2.4 provides in relevant part:

> A fair comparison shall be made between the export price and the normal value…Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability.

48. Thus, under Article 2.4, making a "fair comparison" requires a consideration of how "differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics…" impact price comparability. Moreover, The Appellate Body has stated that, "Under Article 2.4, the obligation to "ensure 'fair comparison' lies on the investigating authorities, and not the exporters. It is those authorities which, as part of their investigation, are charged with comparing normal value and export price and determining whether there is dumping of imports."[18]

49. It is important to understand, however, that although the investigation authority has a burden to ensure a fair comparison, the interested parties also have the burden to support any

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[17] *EC – Fasteners (AB),* para. 499.

[18] `*US – Hot-Rolled Steel (AB),* para. 178.

requested adjustments for differences that affect price comparability. As stated by the Appellate Body in this dispute:

> …this does not mean that the interested parties do not have a role to play in the process of ensuring a fair comparison. Rather, panels in previous disputes have found that exporters bear the burden of substantiating, "as constructively as possible ",[19] their requests for adjustments reflecting the 'due allowance' within the meaning of Article 2.4. If it is not demonstrated to the authorities that there is a difference affecting price comparability, there is no obligation to make an adjustment. Moreover, the fair comparison obligation does not mean that "the authorities must accept each request for an adjustment."[20]

50. Thus, when requesting adjustments to reflect to the "due allowance" within the meaning of Article 2.4, an interested party is responsible for explaining to the investigating authority why such adjustment is warranted. ; Moreover, while the investigating authority is required to make "due allowance" for differences that affect price, Article 2.4 does not require the authority to accept, without evaluation, an interested party's argument that a certain difference affects price comparability and that adjustment is thereby warranted.

51. The United States takes no position on the matter of whether adjustments were actually warranted for the reasons set forth in Article 2.4, i.e, due to differences in "terms of sale, taxation, levels of trade, quantities, physical characteristics…" between the Chinese fasteners and those produced by Pooja Forge. However, to the extent any such differences were indeed "demonstrated to affect price comparability" and the EU Commission was obligated under Article 2.4 of the AD Agreement to make appropriate adjustments. At the same time, the EU Commission was under no obligation to accept without scrutiny a Chinese exporter's assertion that a particular difference affected price comparability and therefore warranted adjustment under Article 2.4.

V. Conclusion

52. The United States thanks the Panel for providing an opportunity to comment on the issues in this proceeding, and hopes that its comments will prove to be useful.

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[19] *EC –Pipe Fittings*, para. 7.158.

[20] *Id.*