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

CHINA – MEASURES IMPOSING ANTIDUMPING DUTIES ON HIGH-PERFORMANCE STAINLESS STEEL SEAMLESS TUBES ("HP-SSST") FROM THE EUROPEAN UNION
(WT/DS460)

THIRD PARTY SUBMISSION OF
THE UNITED STATES

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I. INTRODUCTION

1. The United States makes this third party submission to provide the Panel with its views 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* ("AD Agreement"), the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), and the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") that are relevant to these disputes.

II. PROCEDURAL AND TRANSPARENCY REQUIREMENTS OF ARTICLE 6 OF THE AD AGREEMENT

2. The European Union and Japan allege that China allowed the designation of BCI without requiring good cause shown, in breach of Article 6.5 of the AD Agreement, and that China failed to ensure that confidential information provided by interested parties was summarized, in breach of Article 6.5.1 of the AD Agreement.[1] The European Union also alleges that China failed to take into account relevant information provided during verification of an interested party, in breach of various Article 6 provisions.[2] The European Union and Japan further argue that China provided inadequate disclosure and failed to inform interested parties of the essential facts under consideration, in contravention of Articles 6.4 and 6.9 of the AD Agreement.[3]

A. Designation Of Confidential Information And Requirement For Public Summaries Under Articles 6.5 And 6.5.1 Of The AD Agreement

3. 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 anti-dumping investigations, the submission of confidential information is a necessary and frequent occurrence. Article 6.5 thus requires that investigating authorities, upon good cause shown, 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. Thus, Article 6.5.1 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.

4. As the Appellate Body has explained:

> Articles 6.5 and 6.5.1 accommodate the concerns of confidentiality, transparency, and due process by protecting information that is by nature confidential or is

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[1] *See generally* EU's First Written Submission, paras. 77-97; Japan's First Written Submission, paras. 265-289.

[2] *See generally* EU's First Written Submission, paras. 98-109.

[3] *See generally* EU's First Written Submission, paras. 110-141; Japan's First Written Submission, paras. 290-297.

> submitted on a confidential basis and upon "good cause" shown, but establishing an alternative method for communicating its content so as to satisfy the right of other parties to the investigation to obtain a reasonable understanding of the substance of the confidential information, and to defend their interests.[4]

5. As a consequence, 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. China's Alleged Failure To Accept Certain Information Which Was Presented During Verification

6. The European Union argues that China failed to take into account relevant information which was provided to the investigating authorities during verification of an interested party, in breach of AD Agreement Article 6.7 and Annex I, paragraph 7. Specifically, the European Union claims that China acted inconsistently when MOFCOM refused to take into account the corrected information from an interested party on the procedural ground that the interested party did not raise this point before the verification started.[5]

7. Paragraph 7 of Annex I provides that:

> As the main purpose of the on-the-spot investigation is to verify information provided or to obtain further details, it should be carried out after the response to the questionnaire has been received unless the firm agrees to the contrary and the government of the exporting Member is informed by the investigating authorities of the anticipated visit and does not object to it; further, it should be standard practice prior to the visit to advise the firms concerned of the general nature of the information to be verified and of any further information which needs to be provided, though this should not preclude requests to be made on the spot for further details to be provided in the light of information obtained.

Thus, the main purpose of "on-the-spot investigation" 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.

8. Paragraph 7 of Annex I provides in pertinent part that "it should be standard practice prior to the visit to advise the firms concerned of the general nature of the information to be verified and of any further information which needs to be provided." The United States

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4 *EC – Fasteners (China) (AB)*, para. 542.

5 EU's First Written Submission, para. 100.

considers this language 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.

9. With respect to what must be accepted by the investigating authority, relevant context is provided by Article 6.8 and Annex II. These provide that an investigating authority may make determinations on the basis of facts available when information is not submitted in a reasonable time. In particular, the United States notes that paragraph 3 of Annex II provides:

> All information which is verifiable, which is appropriately submitted so that it can be used in the investigation without undue difficulties, which is supplied in a timely fashion, and, where applicable, which is supplied in a medium or computer language requested by the authorities, should be taken into account when determinations are made.

10. This language recognizes that 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. For example, a firm may have made a simple arithmetic error in preparing data it provided to the investigating authority. It would be entirely reasonable before the on-the-spot verification began for the firm to provide the investigating authority with corrected sums.

11. Conversely, if a firm always could provide substantial corrections once it realized what specific information an investigating authority was verifying during an on-the-spot investigation, the effectiveness of the on-the-spot investigation would be undermined, thus creating severe difficulties and delay. Additionally, the flexibility to accept clerical corrections should not be construed such that the firm could be less motivated to prepare carefully its data submissions (because it can rely on making substantial corrections during the on-the-spot investigation).

12. In sum, the United States agrees with the European Union that an investigating authority is not entitled to reject information on the sole ground that such information was proffered at verification.[6] At the same time, as discussed above, the information need not always be accepted. Rather, the issue requires consideration of the nature of the information and whether acceptance would delay or burden the investigation.

C. Alleged Inadequate Disclosure And Failure To Inform Parties Of The Essential Facts Under Consideration In Violation Of Articles 6.4 And 6.9

[6] *See* EU's First Written Submission, para. 100.

i. Article 6.4 of the AD Agreement Generally Requires the Investigating Authority Give Interested Parties Access to All Non-Confidential Information that is Submitted During an Investigation

13. The European Union claims that China acted inconsistently with Article 6.4 by failing to disclose information that MOFCOM used in its dumping determinations. In particular, the European Union finds it difficult to understand why MOFCOM did not disclose the dumping calculations and data contained therein to the firm which provided MOFCOM with the data used in the calculation.[7] The European Union also argues that China failed to disclose the facts leading to the conclusion that the use of "facts available" was warranted to calculate the all others rate, in breach of Article 6.4.[8]

14. The United States agrees with the European Union that transparency and procedural fairness are key principles reflected in the provisions of the AD Agreement. Failure to ensure transparency and procedural fairness consistent with those provisions could prevent an interested party from being able to meaningfully defend its interest.

15. 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.

16. The Appellate Body has recognized 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.[9] The United States therefore agrees with the European Union 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.[10]

17. The United States agrees further 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. Conversely, there may be aspects of the calculation that may not be able to be disclosed because they contain another interested party's confidential information, for example, because this confidential information was relied on as the

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7 *See* EU's First Written Submission, para. 111.

8 *See* EU's First Written Submission, paras. 124-125.

9 *See EC – Tube or Pipe Fittings (AB)*, para. 146.

10 EU's First Written Submission, para. 111.

facts available under Article 6.8 of the AD Agreement. The second clause of Article 6.4 of the AD Agreement explicitly excludes from the disclosure requirements of Article 6.4 such information treated as confidential under Article 6.5.

ii. Article 6.9 of the AD Agreement Requires the Investigating Authority to Disclose to Interested Parties the Calculations and Data Used to Determine the Existence of Dumping and to Calculate Dumping Margins

18. The European Union and Japan argue that China failed to disclose certain of the essential facts forming the basis for the determination of the dumping margin, including data and calculations which form the basis for the determination of normal value and export prices and the determination of the dumping margin, in violation of Article 6.9.[11] The European Union and Japan also argue that China failed to disclose the particular facts that were used to determine the all others rate, in breach of Article 6.9.[12]

19. Article 6.9 of the AD Agreement requires the investigating authority to disclose to interested parties the "essential facts" forming the basis of the investigating authority's decision to apply anti-dumping duties:

> The authorities shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests.

20. 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 within the meaning of Article 6.9. Indeed, the calculations and underlying data are facts that are "absolutely indispensable" to the determination of the existence and magnitude of dumping.[13] 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. The panel in *EC – Salmon* stated:

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[11] *See generally* EU's First Written Submission, paras. 110-141; Japan's First Written Submission, paras. 290-297.

[12] *See* EU's First Written Submission, paras. 124-254; Japan's First Written Submission, paras. 307-312.

[13] *See EC – Salmon*, para. 7.805 (noting that the ordinary meaning of "essential" includes "of or pertaining to a thing's essence" and "absolutely indispensable or necessary").

> We consider that the purpose of disclosure under Article 6.9 is to provide the interested parties with the necessary information to enable them to comment on the completeness and correctness of the facts being considered by the investigating authority, provide additional information or correct perceived errors, and comment on or make arguments as to the proper interpretation of those facts.[14]

21. If, for example, an interested party is not provided the calculations used by the investigating authority to address dumping, or the data underlying those calculations, the interested party cannot review the investigating authority's calculations to determine whether they contain clerical or mathematical errors, or whether the investigating authority actually did what it purported to do. Unless an interested party is provided with these essential facts, it cannot adequately defend its interests.

22. Furthermore, the panel in *China – Broiler Products* reasoned that, 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.[15] All of these would be "essential" facts within the meaning of Article 6.9.

23. 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.[16] Also, China misinterprets the Appellate Body's finding in *China—GOES*.[17] In discussing the sufficiency of China's disclosure with respect to the injury determination in that dispute, the Appellate Body agreed with the Panel that "[i]n order to allow the respondents to defend their interests, a summary of the 'essential facts' supporting the finding of a 'low price strategy' was required, rather than merely stating the conclusion that such a strategy existed."[18] Thus, China's claim that all that is required is a summary of the essential facts is a misreading of Article 6.9 of the AD Agreement and the Appellate Body's

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[14] *See EC – Salmon*, para. 7.805.

[15] *China – Broiler Products*, para. 7.91.

[16] *See* China's First Written Submission, paras. 648-654; *see also China – Broiler Products*, para. 7.91 (stating that a proper disclosure of the dumping comparison "would require not only identification of the home market and export sales being used, but also the formula being applied to compare them.").

[17] *See* China's First Written Submission, para. 651.

[18] *See China – GOES (AB)*, para. 249.

finding, both of which require that an investigating authority provide the essential facts underlying its determination and not merely a stated conclusion based on these facts.

24. In sum, for the reasons set out above, China acted inconsistently with Article 6.9 of the AD Agreement to the extent that MOFCOM failed to make available to the interested parties the (1) underlying data and calculations it performed to determine the existence and margin of dumping, including the calculation of the normal value and export price for the respondents and (2) the essential facts forming the basis for the calculation of the all others rate. Absent such a disclosure of the essential facts, the interested parties were unable to adequately defend their interests during the antidumping proceeding.

D. Use Of Facts Available To Determine The Dumping Margin With Respect To All Other Companies In Alleged Breach Of Article 6.8 And Paragraph 1 Of Annex II

25. The European Union and Japan claim that China acted inconsistently with Article 6.8 and Paragraph 1 of Annex II of the AD Agreement because MOFCOM determined the dumping margin for "all other" exporters based on facts available without notifying them the required information and the consequences of the failure to submit that information.[19]

26. Article 6.8 states as follows:

> In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available. The provisions of Annex II shall be observed in the application of this paragraph.

Article 6.8 thus 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.[20]

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[19] *See* EU's First Written Submission, paras. 188- 191; Japan's First Written Submission, paras. 299, 302-306.

[20] Article 6.1 of the AD Agreement provides context for Article 6.8 by establishing that the investigating authorities must indicate to the interested parties the information that they require: "All interested parties in an anti-dumping investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question." Article 6.1 thus establishes that an investigating authority that has decided to include a particular exporter or producer "in the antidumping investigation" cannot simply announce that it has initiated the investigation and place the burden on the producer or exporter to come

27. The Appellate Body in *Mexico – Anti-Dumping Measures on Rice* explained that an exporter must be given the opportunity to provide information required by an investigating authority before the latter resorts to facts available.[21] 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 that dispute, the Appellate Body found that the Mexican authorities breached Article 6.8 by using facts available contained in the petition to calculate dumping margins for exporters that the authorities did not investigate and did not give notice of the information required by the investigating authority.[22] Similarly, the panel in *Mexico – Anti-Dumping Measures on Rice* noted that exporters not given notice of the information required of them cannot be considered to have failed to provide necessary information.[23]

28. Article 6.8 should be read together with paragraph 1 of Annex II.[24] Paragraph 1 of Annex II of the AD Agreement requires investigating authorities to ensure that respondents receive proper notice of the rights of the investigating authorities to use facts available:[25]

> As soon as possible after the initiation of the investigation, the investigating authorities should specify in detail the information required from any interested party, and the manner in which that information should be structured by the interested party in its response. The authorities should also ensure that the party is aware that if information is not supplied within a reasonable time, the authorities will be free to make determinations on the basis of the facts available, including those contained in the application for the initiation of the investigation by the domestic industry.

29. Article 6.8 and Annex II, paragraph 1, together ensure that an exporter or producer has an opportunity to provide information required by an investigating authority before the latter resorts

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forward and "appear." Rather, the investigating authority must affirmatively reach out and "give notice" of the information that it requires. *See Argentina – Ceramic Tiles*, para. 6.54: "[A]n investigating authority may not fault an interested party for not providing information it was not clearly requested to submit."

[21] *Mexico – Anti-Dumping Measures on Rice (AB)*, paras. 258-264.

[22] *Mexico – Anti-Dumping Measures on Rice (AB)*, paras. 258-264.

[23] *Mexico – Anti-Dumping Measures on Rice (Panel)*, fn. 211.

[24] *China – GOES (Panel)*, para. 7.384.

[25] *US – Hot-Rolled Steel (AB)*, para. 79 (stating that paragraph 1 of Annex II "is specifically concerned with ensuring that respondents receive proper notice of the rights of the investigating authorities to use facts available . . . .").

to the use of facts available.[26] The panel in *China – GOES* found that China's failure to notify the "all other" exporters of the necessary information required of them did not satisfy the precondition for resorting to facts available found in paragraph 1 of Annex II of the AD Agreement and, as a result, China acted inconsistently with Article 6.8 of the AD Agreement.[27]

30. With respect to notifying "all other" exporters of HP-SSST, MOFCOM posted the Initiation Notice and anti-dumping questionnaires on its website, made the notice available in its public reading room, and sent the notice to the Japanese Embassy in China and the European Union Delegation to China and Mongolia.[28]

31. In sum, the United States understands that China acted inconsistently with Article 6.8 of the AD Agreement and paragraph 1 of Annex II by applying facts available to the extent that MOFCOM had no evidence that any interested party "refused access to" or otherwise "did not provide" information that was "necessary" to the antidumping investigation, or otherwise "significantly impeded" the antidumping investigation.

E. Disclosure of Essential Facts Concerning the Injury Determination

32. The European Union and Japan argue that MOFCOM did not comply with Article 6.9 of the AD Agreement because it failed to disclose information on import and domestic prices essential to its price effects finding.[29] As Japan notes, the disclosure of essential facts is critical if respondents are to have an adequate opportunity to defend their interests.

33. As noted above, Article 6.9 provides that authorities should "before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures." In *China-GOES*, the panel found that 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.[30]

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[26] *Argentina – Ceramic Tiles*, para. 6.55 (providing that the inclusion in Annex II, paragraph 1, of a requirement to specify in detail the information required "strongly implies that investigating authorities are not entitled to resort to best information available in a situation where a party does not provide certain information if the authorities failed to specify in detail the information which was required.").

[27] *China – GOES (Panel)*, para. 7.393.

[28] China's First Written Submission, paras. 570, 573.

[29] EU's First Written Submission, paras.126-141; Japan's First Written Submission, paras.235-252.

[30] *China – GOES* (*Panel*), para. 7.574.

34. Thus, China acted inconsistently with Article 6.9 of the AD Agreement to the extent that MOFCOM failed to disclose to the interested parties information related to domestic prices, import prices, and the comparison of these prices.

III. 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 ARTICLES 12.2 AND 12.2.2

A. With Respect to the Dumping Determination

35. The European Union and Japan allege that China breached Articles 12.2 and 12.2.2 of the AD Agreement because MOFCOM failed to disclose (1) the facts leading to the conclusion that the use of facts available was warranted to calculate all other rates and (2) the facts that were used to determine all others rates. [31]

36. 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."

37. 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 of the AD Agreement requires that the investigative authority provide in sufficient detail the findings and conclusions that lead to application of facts available.

38. Similarly, Article 12.2.2 of the AD Agreement 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.

39. Thus, China acted inconsistently with Articles 12.2 and 12.2.2 to the extent that it failed to provide "in sufficient detail the findings and conclusions" and "all relevant information" related to its determination of the all others rate in its Final Determination.

B. With Respect to the Injury Determination

[31] *See generally* EU's First Written Submission, paras. 142-151; Japan's First Written Submission, paras. 313-319.

40. The European Union and Japan claim that China acted inconsistently with Articles 12.2 and 12.2.2 because MOFCOM's finding of price undercutting omitted key factual information and did not provide the reasoning behind one critical aspect of its price comparisons by type.[32]

41. As noted above, Article 12.2.2 of the AD Agreement provides that in a final determination an 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." In *China – GOES*, the Appellate Body upheld the panel's findings that any facts related to the price comparisons of the subject imports and domestic products are relevant information on the matters of fact that China should have disclosed in MOFCOM's Final Determination.[33]

42. Thus, China acted inconsistently with Article 12.2.2 of the AD Agreement to the extent that MOFCOM failed to disclose information related to price comparison of subject imports and domestic products.

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

A. Determinations Of Administrative, Selling and General Costs Should Be Based, Whenever Possible, on Sales Made in the Ordinary Course of Trade Pursuant to Article 2.2.2 of the AD Agreement

43. The European Union argues that China did not determine the amounts for administrative, selling, and general costs (SG&A) on the basis of records and actual data kept by the exporter or producer under investigation or in a manner that reasonably reflects the costs associated with the production and sale of Product B, in breach of Articles 2.2, 2.2.1, 2.2.1.1 and 2.2.2 of the AD Agreement.[34] In particular, the European Union alleges that MOFCOM improperly utilized data relating to two sample sales made for free (and thus these sales were outside the ordinary course of trade) to establish SG&A.

44. Article 2.2 of the AD Agreement establishes that, under certain circumstances, an investigating authority may determine normal value based on the cost of production of the like product plus a reasonable amount for administrative, selling and general costs and for profits. Article 2.2.2.further provides that for purposes of Article 2.2:

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[32] EU's First Written Submission, paras. 152-159; Japan's First Written Submission, paras. 253-264.

[33] *See, e.g., China – GOES (AB)*, paras 261-267.

[34] *See generally* EU's First Written Submission, paras. 160-175.

> the amounts for administrative, selling and general costs and for profits shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation.

Thus, this first sentence of 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.

45. In this regard, the Appellate Body in *EC – Tube or Pipe Fittings* stated as follows:

> An investigating authority, when determining SG&A and profits under Article 2.2.2, must first attempt to make such a determination using the "actual data pertaining to production and sales in the ordinary course of trade". If actual SG&A and profit data for sales in the ordinary course of trade do exist for the exporter and the like product under investigation, an investigating authority is obliged to use that data for purposes of constructing normal value; it may not calculate constructed normal value using SG&A and profit data by reference to different data or by using an alternative method.[35]

46. The Appellate Body in *US – Hot-Rolled Steel* further observed that "[w]here a sales transaction is 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, the transaction is not an appropriate basis for calculating 'normal' value," and that it could envisage many reasons for which transactions might not be "in the ordinary course of trade."[36]

47. The European Union 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. As noted by the Appellate Body in *US – Hot-Rolled Steel*, there are many reasons to find a normal value sales transaction not in the ordinary course of trade. However, 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.

48. In sum, the United States understands that that China acted inconsistently with Article 2.2.2 of the AD Agreement to the extent that MOFCOM relied on information for sales outside

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[35] *EC – Tube or Pipe Fittings (AB)*, para. 97.

[36] *US – Hot-Rolled Steel (AB)*, paras. 140-141.

the ordinary course of trade when information on sales in the ordinary course of trade were available.

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

49. The European Union also argues that China rejected SMST QR Table 6-5, which apparently constitutes the producer's costs as kept in its books and records. The European Union further avers that these costs were in accordance with the exporting country's generally accepted accounting principles (GAAP), were reasonably associated with the cost and production and sale of the product under consideration, and historically utilized.[37]

50. The United States considers that Article 2.2.1.1 requires 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.[38] This view was adopted by panel in *China – Broiler Products*, which found:

> Although Article 2.2.1.1 sets up a presumption that the books and records of the respondent shall normally be used to calculate the cost of production for constructing normal value, the investigating authority retains the right to decline to use such books if it determines that they are either (i) inconsistent with GAAP or, (ii) do not reasonably reflect the costs associated with the production and sale of the product under consideration. However, when making such a determination to derogate from the norm, the investigating authority must set forth its reasons for doing so.[39]

51. 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.

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[37] EU's First Written Submission, para. 172.

[38] *US – Softwood Lumber V (Article 21.5 – Canada) (AB)*, para. 7.237; *China – Broiler Products*, para. 7.161

[39] *China – Broiler Products*, para. 7.164

C. An Investigating Authority Should Conduct Model Matching To Ensure A Fair Comparison Pursuant to Article 2.4 of the AD Agreement

52. The European Union argues that China did not establish the existence of a margin of dumping for the company at issue on the basis of a fair comparison between the export price and the normal value, and in particular on the basis of a comparison between comparable exports and domestic prices, for Product C, in violation of Article 2.4 of the AD Agreement.[40]

53. Article 2.4 provides:

> A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. 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.

54. Article 2.4 obligates 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. Article 2.4 provides that due allowances must be made for differences affecting price comparability, including differences in physical characteristics. Thus, Article 2.4 ensures that, when an export price transaction is compared to a normal value, any price differences should reflect the presence or absence of dumping, as opposed to the effects of other variables. For instance, Article 2.4 articulates that to ensure a fair comparison between export price and normal value, due allowance shall be made with respect to models with differing physical characteristics, at distinct levels of trade, pursuant to different terms and conditions, and/or in varying quantities, all of which may affect price.[41]

55. 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. Thus, 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,

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[40] *See generally* EU's First Written Submission, paras. 176-186.

[41] *EC –Tube or Pipe Fittings (Panel),* para. 7.157. The panel in *Egypt – Steel Rebar* explained, "[A]rticle 2.4 in its entirety, including its burden of proof requirement, has to do with ensuring a fair comparison, through various adjustments as appropriate, of export price and normal value." (para. 7.335).

some sort of model matching exercise is an essential component of establishing a fair comparison between the export price and normal value consistent with Article 2.4 of the AD Agreement.

56. The European Union argues that MOFCOM failed to take any steps to account for certain physical characteristics that affected price such as the diameter of the pipe products under investigation when it identified which models it would compare for purposes of the fair value comparison.[42] In order to evaluate this claim, the Panel must first determine whether the record evidence demonstrated that the physical characteristics such as diameter may have affected price. If so, the Panel must then determine whether MOFCOM refused to make a due allowance for these physical characteristics. A failure to take make a due allowance for a physical characteristic that affects price would be a breach of Article 2.4 of the AD Agreement.

V. INJURY DETERMINATION

A. Evaluation of the Margin of Dumping

57. The European Union and Japan argue that China failed to comply with Articles 3.1 and 3.4 because it failed to "evaluate the significance of the margins of dumping."[43] The European Union and Japan fault China for failing to "evaluate the significance of the margins of dumping . . . for the impact of the imports on the Chinese HP-SSST industry."[44] The United States notes, however, that Articles 3.1 and 3.4 do not require an authority to evaluate the *significance* of dumping margins. In contrast, other provisions of the AD Agreement may direct an authority to assess the "significance" of a factor, such as Article 3.2.[45] Moreover, neither Article 3.1 nor Article 3.4 requires that the magnitude of the margins of dumping be given any particular weight, or that they be evaluated in any particular way.

58. Furthermore, it is unclear what further evaluation of the dumping margins the European Union and Japan consider MOFCOM should have performed pursuant to Article 3.4. The European Union argues that "Article 3.4 of the Anti-Dumping Agreement, as clarified by the case law, mandates that the impact assessment include at least a reference to this factor."[46]

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[42] *See* EU's First Written Submission, paras. 184-186.

[43] EU's First Written Submission, paras. 260-265; Japan's First Written Submission, paras. 170-174; China's First Written Submission, paras. 425-426.

[44] EU's First Written Submission, para. 260; Japan's First Written Submission, para. 171.

[45] Article 3.2 of the AD Agreement states that investigating authorities shall consider whether there was been a "significant increase in dumped imports," "significant price undercutting by the dumped imports," "or whether the effect of such imports is otherwise to depress prices to a significant degree."

[46] EU's First Written Submission, para. 265.

However, the submissions of the European Union, Japan, and China indicate that MOFCOM's Final Determination did specify the margins.[47]

B. Import Volumes and the Causation Determination

59. The European Union and Japan also argue that the text of Article 3.2 does not authorize an authority to examine the "market share retained by imports" as part of its injury analysis."[48] They assert that neither 3.2 nor 3.5 "allow[s] an authority to attach importance to this fact in its injury or causation analysis."[49] To the extent that they suggest that an authority may not attach significance to the fact that imports "retain" a significant share of the market over the period, the United States disagrees. 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.[50]

60. Indeed, 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 analysis under Article 3.5.

61. Moreover, the Appellate Body has rejected the notion that a "significant increase" in import volumes is required by Article 3.2, stating that "significant increases in imports have to be 'considered' by investigating authorities under Article 3.2, but the text does not indicate that in the absence of such a significant increase, these imports could not be found to be causing injury."[51]

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

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[47] EU's First Written Submission, para. 260; Japan's First Written Submission, para. 171; China's First Written Submission, paras. 425-426.

[48] Japan's First Written Submission, para. 201; EU's First Written Submission, para. 292.

[49] Japan's First Written Submission, para. 201; EU's First Written Submission, para. 292.

[50] In fact, Article 3.1 of the AD Agreement specifies that the authority shall conduct an "objective examination" of "the volume of the dumped imports," not simply the existence of a "significant increase" in that volume.

[51] *EC – Tube or Pipe Fittings* (AB), fn. 114.

62. The European Union and Japan allege that China imposed provisional antidumping measures for a period of six months in violation of Article 7.4 of the AD Agreement.[52]

> Article 7.4 provides:
>
> The application of provisional measures shall be limited to as short a period as possible, not exceeding four months or, on decision of the authorities concerned, upon request by exporters representing a significant percentage of the trade involved, to a period not exceeding six months. When authorities, in the course of an investigation, examine whether a duty lower than the margin of dumping would be sufficient to remove injury, these periods may be six and nine months, respectively.

Thus, 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.

63. The European Union and Japan assert 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. To the extent that these factual assertions are correct, the United States agrees that China breached Article 7.4 of the AD Agreement.

D. The European Union's Proposed Amendments to the Business Confidential Information ("BCI") Procedures and the Request that the Panel Seek Confidential Information Pursuant to Article 13.1 of the DSU

64. The European Union objects to the Panel automatically classifying as BCI in these proceedings information that was submitted as confidential in the challenged antidumping proceeding (unless in the public domain) and objects to the requirement that a party must seek and provide evidence of prior written authorization from the entity that submitted such information in the antidumping proceeding when submitting such information to the Panels.[53] The European Union argues that the current BCI Procedures must be amended to no longer require parties to adhere to the confidential designation in the underlying investigation, or to obtain authorization from the originating firm before submitting such confidential information to the Panel.[54] Furthermore, in case of disagreement, the European Union argues that the Panel

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[52] *See* EU's First Written Submission, paras. 326-328; Japan's First Written Submission, paras. 320-322.

[53] *See* EU's First Written Submission, para. 48.

[54] *See* EU's First Written Submission, paras. 68 and 73.

should make the ultimate decision with respect to BCI designation.[55] The European Union also requests that the Panel utilize its authority under Article 13.1 of the DSU to seek from China information equivalent to the full disclosure that should have been made in the underlying investigation with respect to the claims of the European Union and Japan, and the objection of the Chinese firm should not prevent China from disclosing this information to the Panel.[56] As discussed below, the United States has serious systemic concerns with these EU proposals.

65. At the outset, the United States would note that it is sympathetic to the concern that, where a Member has failed to meet its AD Agreement transparency obligations, it could be difficult for other Members and a panel to evaluate whether anti-dumping determinations are consistent with certain substantive obligations. The United States also agrees that a panel has broad authority during a WTO dispute to seek information from the parties to the dispute.

66. However, the correct course of action is *not* for the Panel to request China to submit to the Panel information which MOFCOM treated as confidential during the antidumping proceeding without the permission of the party that submitted the information to MOFCOM. Such course of action would implicate Article 6.5 of the AD Agreement which requires investigating authorities to *not* disclose information treated as confidential during an antidumping proceeding without permission.

67. Article 6.5 of the AD Agreement provides:

> 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.

The last sentence of Article 6.5 makes clear 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. The United States notes this text does not contain an exception for WTO proceedings.

68. Protecting confidential information, including by securing the specific permission of the party submitting the information, is crucial to the proper functioning of trade remedy

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55 *See* EU's First Written Submission, para. 68.

56 *See* EU's First Written Submission, paras. 331-336.

proceedings.[57] If the protections in Article 6.5 were treated as non-applicable in the context of a WTO 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.

69. As noted, the United States does agree that a panel has broad authority to seek information which it deems appropriate under Article 13.1 of the DSU. However, as explained above, Article 6.5 presents a situation in which a Member has an obligation *not* to reveal such information. It is difficult to see how a panel could consider that a request for information would be "necessary or appropriate" under Article 13.1 of the DSU when to comply with such a request would require a Member to breach its obligations pursuant to the AD Agreement.

70. In this regard, the United States notes that there are alternatives to releasing BCI to the Panel without the submitting party's permission, such as non-confidential summaries of such information.[58]

71. The United States also notes that if a Member has failed to meet its AD Agreement transparency obligations, these are claims that the complaining Member may raise. That is, the complaining Member may allege a breach of AD agreement transparency obligations, such as under Articles 6.4, 6.5.1, 6.9, and 12.2. Indeed, that is the course that the EU and Japan have followed in this dispute. And, should a panel find a breach of these transparency obligations, the responding party would be obligated to bring its measures into compliance with those transparency-related obligations. For all these reasons, the United States considers that 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.

VI. CONCLUSION

72. As noted, the United States believes that the proper interpretation of the provisions of the AD Agreement discussed above has important systemic implications. In particular, the provisions of the related to transparency and procedural fairness are vital to ensuring that

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[57] The United States notes that Article 3.2 of the Agreement on Safeguards contains identical language.

[58] The United States also notes that none of the cases cited by the European Union involved a situation in which the Member's investigating authority deemed certain information BCI in the underlying investigation, and the Panel or Appellate Body essentially ordered the Member to turn over the information through Article 13.1 without the express consent of the party to whom the information belonged. *See* EU's First Written Submission, para. 331, n. 382.

antidumping measures are appropriately applied and that parties have a meaningful opportunity to defend their interests. Furthermore, BCI Procedures adopted in any dispute should continue to recognize the requirement of Article 6.5 of the AD Agreement to not disclose confidential information without the express permission of the party submitting the information to an investigating authority.