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

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

RESPONSES OF THE UNITED STATES TO THE PANEL'S QUESTIONS TO THE THIRD PARTIES

March 14, 2014

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QUESTIONS FOR THE THIRD PARTIES

1. At paragraph 67 of its third-party written submission, the United States submits that "[t]he last sentence of Article 6.5 [of the Anti-Dumping Agreement] 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." Please comment on this statement in light of the European Union's request to remove the obligation to submit the relevant "authorizing letter" from the first sentence of paragraph 2 of the BCI Procedures.

1. The European Union ("EU") request appears founded on some fundamental misunderstandings of the issue presented as well as of Article 18 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Article 6.5 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("Anti-Dumping Agreement" or "AD Agreement"). Although the EU states that the issue of confidentiality in dispute settlement proceedings and in antidumping investigations "should not be conflated," the EU appears to do precisely that.

2. Article 6.5 of the AD Agreement expressly provides that if a party to an investigation provides information on a confidential basis and the investigating authority agrees that such designation of the information is warranted, that investigating authority *shall not disclose* the information without the specific permission of the party submitting it. No provision of the AD Agreement or the DSU creates an exception to Article 6.5 that would permit information that the investigating authority accepted as confidential in the underlying investigation be disclosed within the context of a WTO dispute settlement proceeding without the specific permission of the party submitting that information to the investigating authority.

3. Submission of Article 6.5 confidential information in a dispute settlement proceeding would be disclosure – that is, it would result in the disclosure of the confidential information to the other party(ies) to the dispute as well as to the panel, to the Secretariat, and to third parties.

4. It is important to recall that the proper functioning of trade remedy proceedings requires the protection of confidential information. The ability to obtain confidential information is important to the proper functioning of an investigation. The parties to an investigation need to have confidence that any confidential information they submit will be treated as confidential. Such confidential treatment includes not disclosing it without the specific permission of the party submitting information that it considers confidential, and which the investigating authority accepts as such. If the protections in Article 6.5 of the AD Agreement were treated as non-applicable in the context of a WTO dispute settlement proceeding, parties would be deterred from disclosing confidential information to investigating authorities, potentially impeding or frustrating the proceeding. In addition, Members may have domestic legal provisions that impose penalties, including criminal penalties, on government officials that disclose such information without authorization.

5. The EU would set aside Article 6.5 of the AD Agreement and urge the Panel instead to rely on Article 18.2 of the DSU. But Article 18 of the DSU does not concern the confidentiality

of information provided by parties to an investigating authority. Article 18 of the DSU concerns the confidentiality of information provided by a Member in the course of a dispute settlement proceeding. These are two very distinct issues, as can be seen from the fact that Article 18 of the DSU cannot apply until after Article 6.5 of the AD Agreement has been satisfied. A Member cannot provide information in a dispute settlement proceeding that Article 6.5 of the AD Agreement prevents from being disclosed. Therefore, Article 18 of the DSU would only become relevant once the Member has determined that it is able to disclose the information and has done so.

6. The EU's misunderstanding, and conflation, of the issues is illustrated in its statement that "the additional confidentiality obligation" (which binds other Members but not the adjudicator) is triggered by a designation by the submitting Member. It is not triggered by a designation by any other entity or by a firm, because the DSU provides expressly that it does not regulate the capacity of a Member to disclose statements of its own position to the public."[1] This argument by the EU relates only to Article 18.2 of the DSU; nothing in the EU's statement addresses or reflects the provisions of Article 6.5 of the AD Agreement.

7. Paragraph 2 of the BCI Procedures, which requires the parties to obtain authorizing letters from the entities that submitted the confidential information to MOFCOM during the anti-dumping investigations, is fully consistent with this obligation in Article 6.5. Indeed, the sentence at issue supports and promotes both Article 6.5 of the AD Agreement and Article 18.2 of the DSU. The sentence supports Article 6.5 by recognizing that the information described cannot be disclosed without specific permission. At the same time, the sentence ensures that neither party can choose to disclose only that BCI that supports its position while preventing the other party from having access to, or disclosing, information relevant to its position. The sentence contributes to the Panel's ability to conduct the objective assessment called for under Article 11 of the DSU. Thus, the AD Agreement and the DSU support including this sentence in the BCI Procedures, not removing it.

2. At the first meeting of the Panel with the parties, the European Union stated that DSU proceedings relating to the Anti-Dumping Agreement are subject to Article 17.7 of the Anti-Dumping Agreement, as this provision is listed in Appendix 2 of the DSU.

a. What is the interpretation of the term "provided" in the first sentence of Article 17.7 of the DSU? In your response, please address whether this interpretation should differ or not from the term "disclosed" in the same sentence.

b. What is the interpretation of the terms "person, body or authority" in the first sentence of Article 17.7 of the DSU.

[1] *See* EU's First Written Submission, para. 60. It is not clear what the EU means by "additional" obligation – for instance whether it is additional to the DSU, or additional to that required by Article 6.5 of the AD Agreement. Also, the United States does not understand the basis for the assertion that Article 18.2 binds other Members but not the adjudicator. The first sentence of Article 18.2 states: "Written submissions to the panel or the Appellate Body shall be treated as confidential, but shall be made available to the parties to the dispute." Nothing in this sentence exempts a panel or the Appellate Body from the confidentiality obligation.

8. As explained above in the U.S. response to question 1, Article 6.5 of the AD Agreement provides that once an investigating authority has accepted information as confidential, it shall not disclose that information without the specific permission of the party submitting that information. Article 17.7 of the AD Agreement provides additional protection for this information and thus additional assurances to the party submitting the information.[2] Under Article 17.7, if a Member provides a panel with confidential information, the panel or other parties or third parties to the dispute cannot disclose that information without formal authorization from the relevant person, body or authority. This would include instances in which the information provided to the panel is information to be protected under Article 6.5 of the AD Agreement and for which the party to the investigation submitting it has provided specific permission to disclose it to the panel.

9. Article 6.5 and Article 17.7 make clear that the party to an investigation that submits confidential information is assured that the information will not be disclosed without that party's permission. Importantly, nothing in Article 17.7 displaces or diminishes the investigating authority's obligation to protect confidential information and not to disclose such information without the specific permission of the party submitting such information, as provided in Article 6.5.

10. In addition, Article 17.7 is not limited on its face to information provided by a party to an investigating authority. If a panel receives confidential information from another entity, such as an individual or body under Article 13 of the DSU, then Article 17.7 would also afford protection to that information. In this way, "person, body or authority" could be a party to an investigation, a Member, an expert consulted by the panel, or other entity.

3. Does each of the following provisions contain multiple obligations: Articles 2.2, 2.2.1, 2.2.1.1 and 2.2.2 of the Anti-Dumping Agreement? Please explain.

4. At paragraph 33 of its response to China's requests for preliminary rulings, the European Union states that "as a matter of law, the sufficiency of a panel request must be assessed in the light of the sufficiency of the measure at issue and the disclosure afforded to the interested Member". At paragraph 41 of its response to China's requests for preliminary rulings, the European Union states 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." Please explain how these statements should be reconciled with (i) the Appellate Body's explanation that "compliance with the requirements of Article 6.2 [of the DSU] must be demonstrated on the face of the request for the establishment of a panel" (Appellate Body Report, US – Carbon Steel, para. 127), and (ii) the Appellate Body's statement that "it cannot be assumed that the range of issues raised in an anti-dumping

[2] Article 17.7 of the AD Agreement complements Article 18.2 of the DSU. Article 18.2 of the DSU provides confidentiality to any information submitted by a Member that the Member designates as confidential. Article 17.7 of the AD Agreement would go beyond Article 18.2 of the DSU and keep the information confidential beyond the panel process unless the person, body or authority that originally submitted the information has given permission for it to be disclosed beyond the panel process.

investigation will be the same as the claims that a Member chooses to bring before the WTO in a dispute … although the defending party will be aware of the issues raised in an underlying investigation, other parties may not." (Appellate Body Report, Thailand H-Beams, para. 94)

11. With respect to the EU's statement in paragraph 33 of its response to China's requests for preliminary rulings, the United States agrees that the level of disclosure provided in the underlying proceeding can affect the sufficiency of a complaining Member's panel request. As understood by the Appellate Body, compliance with Article 6.2 of the DSU requires a case-by-case analysis, considering the request "as a whole, and in light of the attendant circumstances."[3] Such circumstances would include the level of disclosure provided in the underlying proceeding. For example, if an investigating authority publishes a normal value that is determined based on the cost of production within the meaning of Article 2.2 of the AD Agreement without disclosing any details on how the cost of production was calculated, this failure to disclose would necessarily limit the level of specificity a complaining party could provide in a panel request that challenged how that cost of production was calculated.

12. With respect to the EU's statement at paragraph 41, 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 Appellate Body statements noted by the Panel above suggest that, contrary to what the EU suggests, argumentation at the administrative proceeding level is not relevant in evaluating the sufficiency of a panel request.

13. Using the issues raised before the investigating authorities during the administrative proceedings would be contrary to Article 6.2 of the DSU, 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.

5. Pursuant to Article 2.4 of the Anti-Dumping Agreement, does an exporter have to demonstrate that physical differences affect price comparability or should an investigating authority assess the issue of price comparability once physical differences are demonstrated?

14. Article 2.4 of the AD Agreement 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.[4] In doing so, Article 2.4 makes clear that"[d]ue 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,

[3] *US – Carbon Steel (AB)*, para. 125.

[4] The Appellate Body has stated that the obligation to make a fair comparison under Article 2.4 is a "general obligation" that "informs all of Article 2." *EC – Bed Linen (AB)*, para. 59.

levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability."

15. 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. Depending on the responses the parties provide and the investigating authority's own analysis of the record evidence, the investigating authority should continue to examine this issue throughout the investigation and develop appropriate product comparison criteria for the antidumping margin calculation. 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.

6. At paragraph 11 of its third-party submission, the United States submits that "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 … [T]he flexibility to accept clerical corrections should not be construed such that the firm could be less motivated to prepare carefully its data submissions". Under what circumstances would an investigating authority be entitled to not accept substantial information provided during an on-the-spot investigation? In your response, please also address the obligations contained in Article 6.7 and Annex I, paragraph 7 of the Anti-Dumping Agreement.

16. Article 6.7 of the AD Agreement provides that "[i]n order to verify information provided or to obtain further details, the authorities may carry out investigations in the territory of other Members." In addition, Paragraph 7 of Annex I provides the procedures for such "on-the-spot investigations", noting that "[a]s 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." In addition, "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, as stated in the U.S. third party submission, the main purpose of "on-the-spot investigation" is to verify the information already submitted or to obtain further detail.[5] Furthermore, with respect to what type of information must be accepted by the investigating authority, relevant context is provided by Article 6.8 and Annex II: "[a]ll 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."

[5] U.S. Third Party Submission, para. 7.

17. Thus, interested parties may provide minor corrections or clarifications to information already submitted as part of the routine nature of an on-the-spot verification. In contrast, on-the-spot investigations are not opportunities for interested parties to submit significant changes to already-submitted questionnaire responses, such as the reporting of numerous new sales or adjustments. If a party submitted information such as numerous new sales during the on-the-spot investigation, an investigating authority would likely not have sufficient time to analyze and then verify these sales during the short time period of its visit. In addition, significant changes during the on-the-spot investigation could cause undue delay or difficulty in the investigation.

18. Generally, whether any information provided at verification should be accepted will be a fact-specific case by case inquiry. For instance, if a firm offers a minor correction at verification that would not cause undue burden or delay, the investigating authority should consider accepting such information. On the other hand, if a firm attempts to submit a large amount of new substantive information that it could have provided in questionnaire responses that may be the type of information that would cause undue burden or delay on the proceeding and the investigating authority may decide not to accept such information.

7. The first part of the second sentence of Article 3.2 of the AD Agreement provides:

With regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member

a. Leaving aside issues of comparability, may an investigating authority find price undercutting simply on the basis that dumped import prices are lower than domestic prices, or is an authority required to also establish that such price differential is an effect of dumped imports? Please explain.

b. If an authority must show that the relevant price differential is an effect of dumped imports, how might it do so?

c. If an authority must show that the relevant price differential is an effect of dumped imports, must that issue be addressed under Article 3.2, or might it rather be addressed in the context of the Article 3.5 causation analysis?

19. Assuming comparability, an investigating authority may find price undercutting on the basis that dumped import prices are lower than domestic prices. The second sentence of Article 3.2 identifies three pricing phenomena to be examined in evaluating the effect of the dumped imports on prices: price undercutting by the dumped imports, price depression, and price suppression. Underselling differs from price suppression or depression in that it is an empirical condition – namely, price undercutting is a condition that may exist whenever the prices of the dumped imports are lower than domestic prices. An empirical finding of price undercutting does not necessarily determine what, if any effect, the dumped imports had on domestic prices, although a finding of price undercutting is a factor that must be considered.

20. For these reasons, the authority is not, using the phrasing of the question, "required to also establish that such price differential [/undercutting] is an effect of dumped imports."

Rather, an authority first examines whether price undercutting exists, and then considers how any undercutting affected domestic prices.

21. We note that other considerations may enter into an investigating authority's assessment of whether price undercutting is "significant," such as price comparability and pertinent conditions of competition in the market, but those are beyond the scope of this question.

8. Assume that in Year 1 both the import price and domestic price is 100. Assume that in Year 2 the import price remains 100, but the domestic price increases to 110.

a. Would these facts alone entitle an investigating authority to find the existence of price undercutting in the sense of the second sentence of Article 3.2? Please explain.

b. If in response to sub-question 7(a) you indicated that an authority must show that the relevant price differential is an effect of dumped imports, please indicate what type of additional information the authority would need in order to do so.

22. Pursuant to Article 3.1 of the AD Agreement, injury determinations "shall be based on positive evidence and involve an objective examination of both *(a)* the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products and *(b)* the consequent impact of these import on domestic producers of such products."

23. In the scenario posed in question 8, the facts in Year 2 would entitle an investigating authority to find the existence of price undercutting during Year 2 in the sense of the second sentence of Article 3.2. As explained in U.S. response to question 7, price undercutting is an empirical condition that may exist when the prices of the dumped imports are lower than domestic prices.