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

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(WT/DS460)

THIRD PARTY STATEMENT OF THE UNITED STATES OF AMERICA AT THE FIRST SUBSTANTIVE MEETING OF THE PANELS WITH THE PARTIES

February 26, 2014

I. Introduction

Mr. Chairperson, Members of the Panels:

1. The United States appreciates the opportunity to appear before you today and provide our views as a third party in these disputes. The concerns raised by Japan and the European Union ('EU") touch upon fundamental obligations – both procedural and substantive – under the Anti-dumping Agreement.[1]

2. In our statement today, the United States will summarize key points in the following areas: First, the claims regarding the procedural and transparency requirements of Article 6; second, the alleged breaches of Article 2 in the calculation of dumping margins; and finally, the injury determination claims with respect to Article 3.

II. Procedural Obligations

A. An Investigating Authority Must Disclose Dumping Margin Calculations Under Anti-dumping Agreement Article 6.9

3. First, we would like to address the alleged failure of China's Ministry of Commerce ("MOFCOM") to disclose essential facts under Article 6.9 of the Anti-dumping Agreement.

4. Article 6.9 requires an investigating authority to disclose the essential facts "under consideration which form the basis for the decision whether to apply definitive measures." The Anti-dumping Agreement only permits definitive measures to be applied where the normal value of the product under investigation exceeds the export price. As normal value and export price constitute "essential facts" for purposes of any antidumping investigation, the data and adjustments to the data (calculations) used to ascertain normal value and export price too are essential facts.

[1] *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("Anti-dumping Agreement").

5. The second sentence of Article 6.9 also makes clear that the aim of disclosure is "to permit parties to defend their interests." As the panel in *EC – Salmon* found, interested parties must have the information necessary "to enable them to comment on the completeness and correctness of the facts being considered by the investigating authority" and to "provide additional information or correct perceived errors."[2]

6. To this end, the panel in *China – Broiler Products* reasoned that, the investigating authority must disclose the data used in the following determinations:

(1) normal value;

(2) export price;

(3) the sales that were used to compare normal value with export prices;

(4) any adjustments for differences which affect price comparability; and

(5) the formulas that were applied to the data.[3]

The panel's reasoning in *China – Broiler Products* was well-founded, and the Panels here should reach the same conclusion on the information that constitutes essential facts within the meaning of Article 6.9.

B. An Investigating Authority Must Allow Interested Parties to See Non-Confidential Data That is Relevant to the Presentation of their Cases Under Article 6.4

7. With respect to Article 6.4 of the Anti-dumping Agreement, the EU makes two primary claims:

[2] *EC – Salmon*, para. 7.805.

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

- First, that MOFCOM failed to disclose the dumping calculations and data that it used in its dumping determination with respect to the firm that actually provided MOFCOM with this data.
- Second, that MOFCOM failed to disclose the facts leading to its decision to resort to "facts available" for the all others rate.

8. The United States agrees with the EU that Article 6.4 generally requires an investigating authority to provide interested parties with access to all non-confidential information submitted during an investigation, and that all information, including confidential information, may be disclosed to the party that submitted it consistent with Article 6.5.

9. Conversely, the United States recognizes that investigating authorities may not be able to disclose all aspects of the calculation, such as confidential information that was relied on as facts available under Article 6.8. In fact, the second clause of Article 6.4 explicitly excludes from the disclosure requirements such information treated as confidential under Article 6.5.

C. Investigating Authorities Must Treat Information as Confidential upon Good Cause and Require Non-Confidential Summaries of Such Information under Articles 6.5 and 6.5.1 of the Anti-dumping Agreement

10. The EU and Japan allege that China allowed the designation of business confidential information (or "BCI") without requiring good cause shown, in breach of Article 6.5. The complainants allege further that China failed to ensure that the confidential information provided by interested parties was summarized, in breach of Article 6.5.1.[4]

11. The United States observes 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,

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

investigative authorities may need to protect confidential information, which is frequently submitted in anti-dumping investigations. Article 6.5 thus requires that investigating authorities, upon good cause shown, ensure the confidential treatment of such information.

12. Article 6.5.1 balances the need to protect such information against the need to disclose it to interested parties. Thus, if an investigating authority accepts confidential information, it must provide or otherwise ensure that confidential information is summarized in sufficient detail to permit a reasonable understanding of the substance of the information.

III. Substantive Obligations

A. Alleged Breach of Article 2.2.2, Article 2.2.1.1, and Article 2.4 in the Calculation of Dumping Margin

13. Turning to the substantive obligations at issue, the United States would now like to address the EU's three claims involving Article 2 of the Anti-dumping Agreement regarding China's calculation of the dumping margins.

14. First, the EU alleges that China breached Article 2.2.2 because China improperly utilized data relating to two sample sales made outside the ordinary course of trade to establish administrative, selling, and general cost ("SG&A").

15. Article 2.2.2 provides that an investigating authority should, where possible, base SG&A and profit on like product made in the ordinary course of trade. If such sales are unavailable, Article 2.2.2 provides alternative methodology for determining SG&A.

16. As is reflected in the Appellate Body's finding in *US – Hot-Rolled Steel*, the investigating authority must evaluate the record evidence to determine whether it supports a 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.[5] To the extent China were to rely on information for sales outside the ordinary course of trade when information on sales in the ordinary course was available, it would breach Article 2.2.2.

17. Second, the EU claims that China acted inconsistently with Article 2.2.1.1 by rejecting the producer's data, which apparently constitutes the producer's costs as kept in its books and records. Article 2.2.1.1 requires an investigating authority to normally calculate costs on the basis of records kept by an exporter or producer provided that these books and records are in accordance with the generally accepted accounting principles ("GAAP") of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration.[6]

18. If the evidence in these disputes establishes that the records met these conditions, China was obligated to use them pursuant to Article 2.2.1.1. Otherwise, China would have had to provide reasons, supported by the record evidence, to depart from the "normal" methodology prescribed in that article.

19. Third, the EU argues that China failed to 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 in breach of Article 2.4 because China evaluated different product mixes without taking any steps to control for differences in physical characteristics affecting comparability or making necessary adjustments.[7]

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

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

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

20. To assess this claim, the Panels should first determine whether the record evidence demonstrated that the physical characteristics such as diameter of the tubes may have affected price. If so, the Panels should then determine whether China refused to make a due allowance for these physical characteristics. If so, China would be in breach of Article 2.4.

B. Injury Determination Claims With Respect to Article 3 of the Anti-dumping Agreement

21. With respect to the complainants' arguments that China breached Articles 3.1 and 3.4 because MOFCOM failed to "evaluate the significance of the margins of dumping,"[8] the United States notes that the text of Articles 3.1 and 3.4 does not require an investigating authority to evaluate the *significance* of dumping margins. By contrast, other provisions of the Anti-dumping Agreement may direct an authority to assess the "significance" of a factor, such as Article 3.2. 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 are evaluated in any particular way.

22. With respect to complainants' argument that text of Article 3.2 does not authorize an authority to examine the "market share retained by imports" as a part of its injury analysis,[9] the United States disagrees to the extent that complainants suggest that the investigating authority may not attach significance to the fact that imports "retain" a significant share of the market over the period of investigation. Article 3.2 does not expressly or implicitly prevent an authority from considering in its analysis the fact that imports have a significant market share level.

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

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

23. 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.

III. Conclusion

24. The United States would like to thank the Panels for their time and attention.