CHINA – ANTI-DUMPING MEASURES ON STAINLESS STEEL PRODUCTS FROM JAPAN

(DS601)

**THIRD PARTY INTEGRATED EXECUTIVE SUMMARY
OF THE UNITED STATES OF AMERICA**

July 25, 2022

EXECUTIVE SUMMARY OF U.S. THIRD PARTY SUBMISSION

I. CLAIMS RELATING TO THE INJURY AND CAUSATION DETERMINATIONS

1. Article 3.2 of the AD Agreement directs an authority to examine whether subject imports significantly depressed the prices of like domestic products. It does not impose specific obligations on how an authority must conduct a price depression analysis, nor prescribe a particular methodology or set of factors that must apply in any such analysis. However, Article 3.1 does provide that a determination of injury "shall be based on positive evidence and involve an objective examination of . . . the effect of the dumped imports on prices in the domestic market for like products."

2. In addition, Articles 3.1 and 3.2 of the AD Agreement require the authority to ensure comparability between the domestic and subject imported products for which prices are being examined by making adjustments where required to reflect any material differences. The objective of such adjustments is to ensure that whatever price differentials arise from a comparison of domestic and imported goods result from price effects, and not merely from differences in the products or transactions being compared, absent the necessary adjustments to control and adjust for relevant differences in product characteristics.

3. Thus, the question before the Panel regarding Japan's challenge to MOFCOM's price effects analysis, particularly with respect to price comparability, is whether a reasonable, unbiased authority, looking at the same evidentiary record, could have reached the same conclusions as MOFCOM.

4. Article 3.3 of the AD Agreement Specifies the prerequisites for cumulation. Given these specified textual prerequisites for cumulation, there is no basis to impose other, unmentioned prerequisites.

5. Article 3.4 of the AD Agreement provides that "[t]he examination of the impact of dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry" and enumerates certain factors that an authority must include in its evaluation. Article 3.4 imposes an obligation on the authority to conduct an "examination" of the impact of the dumped imports on the domestic industry. And the text of Article 3.4 expressly requires investigating authorities to examine the "impact" of subject imports on a domestic industry, and not just the state of the industry.

6. As recognized by Articles 3.1 and 3.2 of the AD Agreement, subject imports can influence a domestic industry's performance through volume and price effects. Thus, to examine the impact of subject imports on a domestic industry, an authority would need to consider the relationship between subject imports – including subject import price undercutting, and the price depressing or suppressing effects of subject imports – and the domestic industry's performance during the period of investigation.

7. In other words, in examining the relationship between subject imports and the state of the domestic industry pursuant to Article 3.4 of the AD Agreement, an authority must consider whether changes in the state of the industry are the consequences of subject imports and whether

subject imports have explanatory force for the industry's performance trends. However, Article 3.4 does not dictate the methodology that should be employed by the authority, or the manner in which the results of this evaluation are to be set out. The Panel must be able to discern that the authority's examination of the impact on the domestic industry – an examination that necessarily includes an evaluation of relevant economic factors – is based on positive evidence and an objective examination. In making this assessment, the Panel must determine whether an unbiased and objective investigating authority could have reached the same conclusion as MOFCOM did here.

8. Finally, the second sentence of Article 3.5 requires an authority to examine "all relevant evidence" before it both to ascertain whether there was a causal link between the dumped imports and the injury experienced by the domestic industry and to examine whether factors other than the dumped imports were also causing injury. The third sentence of Article 3.5 requires an authority to examine "any known factors other than the dumped imports which at the same time are injuring the domestic industry" to ensure that "the injuries caused by these other factors must not be attributed to the dumped imports." A non-attribution analysis is therefore necessary if (i) there are one or more known factors other than the dumped imports that (ii) are injuring the domestic industry (iii) at the same time.

9. While an authority is under no express requirement to "seek out and examine in each case on their own initiative the effects of all possible factors other than imports that may be causing injury to the domestic industry under investigation," an authority's findings and analysis under Article 3.5 must comply with the "positive evidence" and "objective examination" requirements of Article 3.1.

II. Claims Relating to the Definition of the Domestic Industry

10. Article 4.1 must be read in conjunction with Article 3.1. Article 4.1 of the AD Agreement provides that, with certain defined exceptions, "the term 'domestic industry' shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products."

11. Article 4.1 establishes that the "domestic industry" can be defined as either (1) the "domestic producers as a whole of the like products," i.e., all domestic producers, or (2) a subset of domestic producers "whose collective output of the products constitutes a major proportion of the total domestic production" of the like products. Article 4.1 of the AD Agreement does not require that all domestic producers be included in the domestic industry, nor does it articulate a minimum limit on the percentage of domestic production that must be included to constitute a "major proportion" of the total domestic production of those products.

12. Although undefined in the AD Agreement, the term "major proportion" must be interpreted in the context of Article 3.1 of the AD Agreement. Thus, Article 3.1 of the AD Agreement sets forth two overarching obligations that apply to multiple aspects of an authority's injury determination. The first overarching obligation is that the injury determination be based on "positive evidence." The second obligation is that the injury determination involves an "objective examination" of the volume of the dumped imports, their price effects, and their

impact on the domestic industry. Under this obligation, the domestic industry is to be investigated in an unbiased manner that does not favor the interests of any interested party in the investigation. How an authority chooses to define the domestic industry has repercussions throughout the course of the injury analysis and determination; thus, the overarching obligations of Article 3.1 necessarily extend to an authority's definition of the domestic industry.

13. The plain language of Articles 3.1 and 4.1 of the AD Agreement should guide the Panel's analysis. First, the Panel should consider whether the authority, consistent with Article 4.1 of the AD Agreement, defined the domestic industry as "domestic producers as a whole," or instead defined the domestic industry as those producers whose production constitutes a "major proportion" of total domestic production of the like product. The Panel should consider whether the authority, consistent with Article 3.1, defined the domestic industry in a fair and unbiased manner. A flawed definition of the domestic industry can distort an authority's material injury analysis.

14. Accordingly, the Panel is to evaluate whether the authority's definition of the domestic industry introduces a distortion to the analysis. The Panel's analysis on risk of distortion should thus begin with consideration of the domestic production captured by MOFCOM's definition of the domestic industry.

15. Even if MOFCOM's definition were to meet the "major proportion" of domestic production standard of Article 4.1, the Panel should assess whether MOFCOM's definition of the domestic industry was biased or designed to favor the interest of any group of interested parties in the investigation, inconsistent with Article 3.1 of the AD Agreement. In other words, the Panel must determine whether an unbiased and objective investigating authority could have reached the same conclusion as MOFCOM did regarding the definition of the domestic industry.

III. Claims Relating to the Conduct of the Investigations

16. Article 6 of the AD Agreement balances the protection of confidential information with the right of parties to be given a full and fair opportunity to see relevant information and defend their interests. Article 6.5 requires that investigating authorities ensure the confidential treatment of information. Article 6.5.1 then balances the need to protect confidential information against the disclosure requirements of other Article 6 provisions by requiring that, if an investigating authority accepts confidential information, it shall require that confidential information be summarized in sufficient detail to permit a reasonable understanding of the substance of the information.

17. Based on the above, the Panel should first determine if the investigating authority appropriately designated information as confidential. The Panel should then determine whether the investigating authority ensured that a summary of that confidential information was provided to other parties in sufficient detail to permit a reasonable understanding of the substance of the information.

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

19. The meaning of "essential facts" is informed by the description that these facts "form the basis for the decision whether to apply definitive measures" and by the requirement that they be disclosed "in sufficient time for the parties to defend their interests." Without a full disclosure of the essential facts under consideration in the underlying determinations, it would not be possible for a party to identify whether an investigating authority's determination contains errors or even whether the investigating authority actually did what it purported to do. Such failure to provide this information would result in an interested party being unable to defend its interests.

20. Based on the language of Article 6.9, it stands to reason that "only those methodologies the knowledge of which is necessary for the participants to understand the basis of the investigating authority's decision and to defend their interests would be essential facts under Article 6.9." A panel must assess, in the specific context of each investigation, whether a particular calculation or methodology constitutes an "essential fact," for which disclosure is required under Article 6.9.

IV. Claims Relating to the Public Notices and Explanation of Determinations

21. Articles 12.2 and 12.2.2 of the AD Agreement require authorities to provide "in sufficient detail the findings and conclusions reached on all issues of fact and law considered material" by the investigating authority, and "all relevant information on the matters of fact and law" leading to the imposition of definitive measures. These provisions require an authority to disclose the facts, law, and reasons that led to the imposition of anti-dumping duties, so as to enable interested parties to, among other things, "pursue judicial review of a final determination."

22. The Panel, in evaluating Japan's Article 12.2 and 12.2.2 claims, should assess whether MOFCOM has set forth its pertinent findings and conclusions, as well all relevant information on matters of fact and law leading to the imposition of definitive measures, "in sufficient detail."

Executive Summary of U.S. Third Party Oral Statement

23. Article 4.1 must be read in conjunction with Article 3.1. Article 4.1 of the AD Agreement provides that, with certain defined exceptions, "the term 'domestic industry' shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products."

24. Article 4.1 establishes that the "domestic industry" can be defined as either (1) the "domestic producers as a whole of the like products," i.e., all domestic producers, or (2) a subset of domestic producers "whose collective output of the products constitutes a major proportion of the total domestic production" of the like products.

25. Although undefined in the AD Agreement, the term "major proportion" must be interpreted in the context of Article 3.1 of the AD Agreement. Article 3.1 sets forth two overarching obligations that apply to multiple aspects of an authority's injury determination. The first overarching obligation is that the injury determination be based on "positive evidence." The second obligation is that the injury determination involves an "objective examination" of the volume of the dumped imports, their price effects, and their impact on the domestic industry.

Under this obligation, the domestic industry is to be investigated in an unbiased manner that does not favor the interests of any interested party in the investigation. How an authority chooses to define the domestic industry has repercussions throughout the course of the injury analysis and determination; thus, the overarching obligations of Article 3.1 necessarily extend to an authority's definition of the domestic industry.

26. Articles 3.1 and 3.2 of the Anti-Dumping Agreement as requiring the authority to ensure comparability between the domestic and subject imported products for which prices are being compared and to make adjustments where required to reflect any material differences. The objective of such adjustments is to ensure that whatever price differentials arise from a comparison of domestic and imported goods result from price effects, and not merely from differences in the products or transactions being compared.

EXECUTIVE SUMMARY OF U.S. THIRD PARTY RESPONSES TO QUESTIONS

27. Response on Question 1: Article 3.1 of the AD Agreement sets forth two overarching obligations. The first obligation is that the injury determination must be based on "positive evidence." The second obligation is that the injury determination must involve an "objective examination" of the volume of the dumped imports, their price effects, and their impact on the domestic industry.

28. By its terms, Article 3.1 indicates that these obligations extend to every aspect of an investigating authority's injury analysis. Article 3.1 thus requires an investigating authority to ensure that any material injury determination be based on "positive evidence" and involve an "objective examination" – including with respect to assessing the impact on domestic producers.

29. To assess the impact on domestic producers, an investigating authority must take into account which domestic producers it refers to in its definition of the term "domestic industry" under Article 4.1 of the AD Agreement – and must do so on the basis of positive evidence and through an objective examination.

30. Response on Question 2: The plain text of Article 3.3 of the AD Agreement specifies the prerequisites for cumulation. These are the only specified textual prerequisites for cumulation, and there is no basis to impose other, unmentioned prerequisites, such as the proposed requirement to foreclose the possibility that the alleged injury to the domestic industry was being caused only by subject imports from some of the sources under investigation.

31. Response on Question 3: The text of Article 3.2 does not require an investigating authority to use any particular type of price undercutting analysis. Nor does it address price comparability, let alone adjustments for "significant" price differences. However, the analytical methodology an authority uses must conform with the "positive evidence" and "objective examination" standards specified in Article 3.1.

32. Response on Question 4: MOFCOM's resort to facts available with respect to one aspect of its price effects analysis does not require Japan to raise a claim under Article 6.8 of the AD Agreement or preclude claims under other provisions of the AD Agreement.

33. Japan is not challenging China's use of Customs data as facts available to replace missing questionnaire data. As explained in its first written submission, Japan is challenging MOFCOM's failure to ensure price comparability, which is properly challenged under Articles 3.1 and 3.2 of the AD Agreement.

34. Response on Question 5: One of the prerequisites in Article 3.3 of the AD Agreement to cumulate imports is that an investigating authority must determine that such an assessment is "appropriate in light of the conditions of competition." Article 3.3 does not identify any specific conditions of competition that must exist for an appropriateness determination to be warranted.

35. Thus, it is incorrect that an investigating authority may "only" find cumulation to be appropriate where imports from different sources under investigation are substitutable.

36. Response on Question 6: Before an investigating authority determines whether to exercise its discretion to cumulate imports, it must first define the domestic product or products like the imported products identified in an application.

37. There are no additional substantive provisions to those set out in Article 2.6 relating to the definition of the "like product" in a particular investigation. Accordingly, an investigating authority must determine which domestic product is "alike in all respects, or . . . has characteristics closely resembling those of the product under consideration." The determination of the investigating authorities regarding the "like product" must be based on positive evidence and an objective examination of the relevant facts; in those circumstances, the determination is consistent with the AD Agreement.

38. The hypothetical posed by the Panel appears to presume that the investigating authority determined that there was a single domestic like product consisting of both Model A and Model B, and one domestic industry producing both models. In that case, the authority could cumulate subject imports from all sources so long as the requirements of Article 3.3 were met.

39. As the United States indicated above in its response to question 2, an investigating authority may cumulate imports under Article 3.3 of the AD Agreement only if, first, the dumping margins for the individual countries are more than *de minimis*, and second, the volume of imports from the individual countries are not negligible. In addition, the investigating authority must determine that a cumulative assessment is appropriate "in light of the conditions of competition both between the imported products and between the imported products and the like domestic product."