CHINA – MEASURES IMPOSING ANTI-DUMPING DUTIES ON HIGH-PERFORMANCE STAINLESS STEEL SEAMLESS TUBES ("HP-SSST") FROM JAPAN
(AB-2015-4 / DS454)

CHINA – MEASURES IMPOSING ANTI-DUMPING DUTIES ON HIGH-PERFORMANCE STAINLESS STEEL SEAMLESS TUBES ("HP-SSST") FROM THE EUROPEAN UNION
(AB-2015-5 / DS460)

THIRD PARTICIPANT SUBMISSION OF THE UNITED STATES OF AMERICA

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EC – Fasteners (China) (AB)	Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R, adopted 28 July 2011
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US – Hot-Rolled Steel (AB)	Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products From Japan*, WT/DS184/AB/R, adopted 23 August 2001
US – Softwood Lumber VI	Panel Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/R, adopted 26 April 2004

I. INTRODUCTION

1. The United States welcomes this opportunity to provide its views on certain issues raised in these disputes, in which the European Union ("EU"), Japan, and China appeal certain findings by the Panel. The United States has a strong interest in the proper interpretation and application of the 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. In this submission, the United States will offer views on the issues raised in these appeals in relation to the Panel's findings under Article 2, Article 3, Article 6, and Article 17 of the AD Agreement.

II. THE PANEL'S ANALYSIS REGARDING PROCEDURAL AND TRANSPARENCY REQUIREMENTS UNDER ARTICLES 6 AND 17 OF THE *ANTI-DUMPING AGREEMENT*

A. The Panel's Amendments to the Business Confidential Information ("BCI") Procedures and Its Interpretation of Articles 6.5 and 17.7 of the AD Agreement

2. In its appeal, the EU objects to the Panel classifying as BCI in these proceedings information that was submitted as confidential in the challenged antidumping proceeding and takes issue with the Panel's interpretation of Articles 6.5 and 17.7 of the AD Agreement.[1] The United States finds appropriate the Panel's clarification of the first paragraph of the BCI Procedures and seeks to clarify the proper interpretation of these provisions.

3. Before turning to these two grounds of the EU appeal, the United States has the following cross-cutting comment. The EU's appellee submission contains a lengthy discussion of various WTO provisions related to "confidential" information. However, the EU's discussion makes the fundamental error of conflating two different, albeit somewhat related, issues: (1) the confidentiality obligations under the AD Agreement – applicable to the investigating authorities on the conduct of investigations and on the subsequent protection of information submitted in those proceedings; and (2) a panel's exercise of discretion to adopt procedures to protect various types of sensitive information submitted in, or relevant to, a WTO dispute settlement proceeding. The former issue turns on the interpretation and application of the AD Agreement, while the latter involves the panel's discretion under Article 12.1 of the DSU to adopt additional working procedures in consultation with the parties. Because the EU's appellee submission mixes these two legal issues, the United States finds that the EU has not presented a helpful framework for examining confidentiality issues.

4. The following example may help to highlight the distinction. The complaining party alleges that an investigating authority has breached obligations under Article 6.4 of the AD Agreement to allow interested parties to see all relevant information. In particular, the complaining party alleges that the investigating authority has improperly designated certain information as confidential under Article 6.5, and thus the exception in Article 6.4 for confidential information was not applicable. This claim would be examined under the relevant

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[1] *See* EU's Other Appellant Submission, paras. 37-69.

provisions of the AD Agreement. And if the claim were successful, the responding Member would decide what means it would take to comply with such a finding.

5. A separate issue would be how the panel, in conducting the panel proceeding, decided to treat this allegedly confidential information. This issue would be governed by the DSU, as well as by the panel's working procedures, which should be consistent with the DSU and adopted in consultation with the disputing parties.[2] In this scenario, and in the event the allegedly confidential information was submitted in the proceeding, the panel likely would have to treat the disputed information as confidential during the panel process. This would be the case even though the ultimate finding might be that the authority treated the information improperly under Articles 6.4 and 6.5 of the AD Agreement. Otherwise, the panel would take upon itself the authority to release allegedly confidential information in advance of any WTO Dispute Settlement Body ("DSB") finding that the information was improperly treated by the investigating authority, and despite the fact that it is up to Members – not panels – to decide how DSB findings should be implemented.

6. The United States will now turn to the two specific issues raised by the EU. First, the EU has provided no basis for a finding that that the Panel's clarifications to the first paragraph of the BCI Procedures breaches the Panel's discretion to adopt its own procedures. This paragraph originally stated, in part: "These procedures apply to any business confidential information that a party wishes to submit to the Panels…*In this regard, BCI shall include information that was previously submitted to China's Ministry of Commerce ('MOFCOM') as BCI in the anti-dumping investigation at issue in these disputes.*"[3] The Panel's amendment to this language clarifies that BCI shall include information that was previously *treated* by MOFCOM as BCI.[4] The United States agrees with this revision, which is fully within the discretion of the Panel in adopting its Working Procedures.

7. Indeed, this type of working procedure appears to be fully consistent with the special DSU rule for the treatment of confidential information in disputes involving the AD Agreement. In particular, Appendix 2 of the DSU provides that Article 17.7 of the AD Agreement is a special or additional rule applicable in disputes under the AD agreement. Article 17.7 provides:

> Confidential information provided to the panel shall not be disclosed without formal authorization from the person, body or authority providing such information.

The United States understands the "confidential information" mentioned in Article 17 to include the information that is "by nature confidential" as described in Article 6.5 of the AD Agreement.

8. As the Panel stated, "in the context of a dispute brought under the Anti-Dumping Agreement, the phrase 'confidential information' in Article 17.7 refers to the confidential

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2 *See* DSU, Art. 12.1.
3 Panel Report, para. 7.10 (emphasis original).
4 Panel Report, para. 7.18.

information previously examined by the investigating authority and treated as confidential pursuant to Article 6.5 – and which is now provided to a dispute settlement panel pursuant to Article 17.7."[5] This statement is correct, although as the United States will describe below, it would not be correct to read Article 17.7 as requiring that all information treated as confidential under Article 6.5 actually be submitted to the Panel. Leaving that issue aside, Article 17.7 does support that a panel should not disclose allegedly confidential information before the DSB had made any findings that the authority had improperly treated information as confidential. And, even if Article 17.7 does not compel this result, the EU has provided no basis to find that the specific BCI procedures adopted by the Panel amount to an abuse of the Panel's discretion to adopt its own working procedures.

9. The United States will now turn to the second issue raised by the EU, namely, the Panel's interpretation of Articles 17.7 and 6.5 of the AD Agreement as it relates to the second paragraph of the original BCI Procedures.,[6] That paragraph required a party submitting BCI to provide an authorizing letter from the person or entity that supplied the information. The United States notes that no party has appealed the Panel's decision to accede to the EU's request to remove the second paragraph of the BCI Procedures. However, the EU itself has appealed the Panel's findings and conclusions regarding Articles 17.7 and 6.5 of the AD Agreement that formed the basis for the Panel's decision. As described below, the United States does not agree with the EU's proposed interpretation of Articles 6.5 and 17.7, or with that apparently adopted by the Panel.

10. Article 6.5 of the AD Agreement concerns the confidentiality of information provided by parties to the investigating authority during the relevant antidumping proceeding. It 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.

11. The United States notes this text does not contain an exception for WTO proceedings. To the contrary, submission of Article 6.5 confidential information in a dispute settlement proceeding constitutes 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, the Secretariat, and third parties. Nor does Article 17.7 provide that confidential information necessarily should be provided to WTO panels. Rather, Article 17.7 addresses the situation that applies *after* the

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5 Panel Report, para. 7.21.

6 *See* Panel Report, paras. 7.26-7.29.

investigating authority has concluded that certain confidential information may be submitted to the panel, and describes the conditions under which the panel can further disclose such information.

12. Article 17.7 provides, in relevant part, that "[c]onfidential information provided to the panel shall not be disclosed without formal authorization from the person, body or authority providing such information." According to the Panel, "the difference in language between 'disclosure' and 'provided' in this provision indicates that the 'provision' of confidential information to the panel in the context of a dispute under the Anti-Dumping Agreement does not amount to its 'disclosure' under Article 6.5."[7] This reasoning, however, is not persuasive. There is no textual reason why the "provision" of information to a panel, as described in Article 17.7, necessarily precludes that such an action could amount to a disclosure under Article 6.

13. Rather, to the extent the Panel's finding rests on the conclusion that Article 17.7 of the AD Agreement carves out an exception to the Article 6.5 prohibition against unauthorized disclosure, that finding is in error. Article 17.7 should be read in harmony with Article 6.5 so as to enable an authority to prevent the unauthorized disclosure of information. In particular, pursuant to Article 6.5, 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. However, once the investigating authority has secured the specific permission of the submitting party to share the confidential information in a limited context, such as in the context of a dispute proceeding under the additional protections of the relevant BCI procedures, then the respective Member may provide that information to the Panel consistent with the requirements of Article 6.5. Article 17.7 in turn then requires the Panel to protect that information from further disclosure, unless the Panel has secured the express authorization from the person, body, or authority that provided the information.

14. Furthermore, the United States would highlight that certain Member's domestic antidumping laws (including those of the United States), that implement Article 6.5 of the AD Agreement make clear that confidential information submitted in antidumping proceedings may not be used for any other purpose, including for submission in other fora. This is an additional, important type of consideration that a panel must consider when adopting its working procedures.

15. The United States would also emphasize 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 the information without the specific permission of the submitting party that considers it 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 may be deterred from disclosing confidential information to the investigating authorities,

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[7] *See* Panel Report, para. 7.28.

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.

16. Lastly, the United States disagrees with the EU's arguments that the treatment of BCI submitted in an antidumping proceeding should ultimately lie with the Panel, and not the Member.[8] As noted in the U.S. third party submission to the Panel, the United States 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 antidumping determinations are consistent with certain substantive obligations.[9] The United States also agrees that a panel has broad authority during a WTO dispute to seek information from the parties to the dispute.

17. However, the correct course of action is *not* for a panel to request an authority to submit to the panel information which the authority treated as confidential during the antidumping proceeding without the permission of the party that submitted the information. As discussed above, such course of action would implicate Article 6.5 of the AD Agreement which requires investigating authorities *not* to disclose information treated as confidential during an antidumping proceeding without permission.

18. Rather, the United States notes that if a Member has failed to meet its AD Agreement transparency obligations, there are distinct 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, as the Panel has found here, the responding party would be obligated to bring its measures into compliance with those transparency-related obligations. For all these reasons, Articles 6.5 and 17.7 must be interpreted to allow for the protection of all unauthorized disclosures of confidential information.

B. Designation of Confidential Information and the Requirement for an Explanation of Whether Such Confidential Treatment is Warranted Under Article 6.5 of the AD Agreement

19. To the extent the Panel found that MOFCOM acted inconsistently with Article 6.5 by failing to provide written explanations that state its specific reasoning as to why good cause had been demonstrated with respect to requests for confidential treatment, this finding is in error.[10] While the United States takes no position on whether the facts presented support a conclusion that China improperly treated information as confidential without a demonstration of good cause, the United States agrees with China that the Panel's findings on this issue appear to impose

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8 *See* EU's Other Appellant Submission, paras. 3-69.
9 *See* U.S. Third Party Submission, paras. 64-71.
10 *See* Panel Report, para. 7.299-7.303.

additional obligations on the part of the investigating authority that are not required under Article 6.5 of the AD Agreement. [11]

20. 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 to defend their interests. At the same time, investigative authorities may need to protect confidential information. Article 6.5 requires that investigating authorities ensure confidential treatment of such information where there is good cause shown. Article 6.5.1 then balances that need against the disclosure requirements of other Article 6 provisions by providing 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.

21. The Appellate Body has interpreted Article 6.5 consistently with this understanding. In particular, in *EC – Fasteners (China)*, the Appellate Body found that an investigating authority "must objectively assess the 'good cause' alleged for confidential treatment, and scrutinize the party's showing in order to determine whether the submitting party has sufficiently substantiated its request".[12]

22. Thus, Article 6.5 does not provide that an objective assessment for good cause requires that the investigating authority explain its conclusions as to why good cause has been demonstrated, and to the extent the Panel has required otherwise, the Panel's interpretation is without grounds. As such, the United States agrees with China that the Panel appears to have misinterpreted Article 6.5 by finding an obligation that is not supported by the text of that provision. The United States also shares China's concerns that this interpretation of the Article 6.5 requirements could lead to substantial delays and the expenditure of limited resources.[13]

C. China's Alleged Failure to Accept Certain Information Which Was Presented during Verification and the Application of Facts Available Under Article 6.7 of the AD Agreement

23. The Panel found that China acted inconsistently with Article 6.7 and Paragraph 7 of Annex I of the AD Agreement when MOFCOM refused to take into account corrected information from an interested party solely on the procedural ground that the interested party did not raise this point before the verification started.[14] China argues that the Panel erred in its conclusion that China acted inconsistently with these provisions by failing to take into account relevant information which was provided to the investigating authorities during the verification of an interested party.[15] In turn, the EU presents a conditional appeal: if the Appellate Body overturns the Panel's findings with respect to China's breach of Article 6.7 and Paragraph 7 of Annex I of the AD Agreement, the Appellate Body should also reverse or modify the Panel's

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11 *See* China's Appellant Submission, paras. 286-290.
12 *EC – Fasteners (China) (AB)*, para 539.
13 *See* China's Appellant Submission, paras. 306-311.
14 *See* Panel Report, para. 7.99-7.100.
15 *See* China's Appellant Submission, paras. 124-138.

conclusions with respect to Article 6.8 and Paragraphs 3 and 6 of Annex II of the AD Agreement.[16]

24. The United States agrees with China that neither Article 6.7 nor Paragraph 7 of Annex I contain an affirmative obligation to conduct verification, or to accept all information presented during verification.[17] That being said, the United States recalls that in determining which information to accept, relevant context is provided by Article 6.8 and Annex II.

25. In accordance with Paragraph 7 of Annex I, the main purpose of the "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. In addition, 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 considers this language to mean 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.

26. Here, the Panel recognized that MOFCOM had requested the interested party to prepare documents relating to certain information that was already on the record, and that the documentation provided by the interested party facially appeared to satisfy that request.[18] Thus, the Panel found that MOFCOM's rejection of this information on the sole basis that the interested party did not provide this information prior to the verification was inconsistent with Article 6.7 and Paragraph 7 of Annex I of the AD Agreement.[19]

27. Article 6.8 and Annex II 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.

28. This language recognizes that the investigating authority is not required to use information in certain circumstances, including when the information is submitted in an untimely fashion and when its acceptance would cause difficulties in the conduct of the investigation.

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16 *See* EU's Other Appellant Submission, paras. 84-108.

17 *See* China's Appellant Submission, paras. 124-135.

18 *See* Panel Report, paras. 7.99-7.100.

19 *See* Panel Report, para. 7.99 ("[W]e consider that MOFCOM acted contrary to the main purpose of the on-the-spot investigation when it expressly requested SMST to prepare documents relating to table 6-5, but later rejected information which was potentially relevant to such table on the sole ground that SMST did not raise this matter before the verification started.")

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.

29. 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).

30. The Panel found that the EU's claims with respect to Article 6.8 and Paragraphs 3 and 6 of Annex II were not supported because MOFCOM did not rely on the facts otherwise available in place of this rejected information.[20] The United States agrees with the Panel that it would be improper to review a claim under these provisions if the investigating authority did not actually make a determination on the basis of the facts otherwise available.

31. In sum, the United States does not agree with the Panel that Article 6.7 and Paragraph 7 impose affirmative obligations on the investigating authority to accept certain information at verification. That being said, the United States agrees that an investigating authority is not entitled to reject information on the sole ground that such information was proffered at verification. 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.

D. Alleged Inadequate Disclosure and Failure to Inform Parties of the Essential Facts Under Consideration in Violation of Article 6.9

32. The EU argues that the Panel made legal errors in its findings with respect to the EU's claim that China failed to satisfy its obligations under Article 6.9 of the AD Agreement. The Panel found that MOFCOM's failure to disclose its calculation methodology was inconsistent with Article 6.9,[21] but that MOFCOM's disclosures of the underlying data which formed the basis for the determination of the dumping margin satisfied the requirements of Article 6.9.[22] The United States submits that the Panel erred in part for the reasons discussed below.

33. 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

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20 *See* Panel Report, para. 7.102.

21 Panel Report, paras. 7.237-7.239.

22 *See* EU's Other Appellant Submission, paras. 179-190; Panel Report, paras. 7.234-7.236.

> in sufficient time for the parties to defend their interests.

The term "essential facts" is in part defined by the statement that these facts "form the basis for the decision whether to apply definitive measures." Equally important, the text of this provision indicates that the essential facts are those that that are needed for the parties to "defend their interests."

34. 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 necessary to the process of analysis and decision-making by the investigating authority" with respect to the determination of the existence and magnitude of dumping.[23] 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. Consistent with this interpretation, the panel in *EC – Salmon (Norway)* stated:

> 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.[24]

35. The Panel in this dispute found that MOFCOM's provision of a narrative description, rather than the actual data underlying its dumping determination, met the investigating authority's obligations under Article 6.9, so long as "such description does not leave uncertainty as to the essential facts under consideration."[25] The Panel concluded that the EU had not identified with any particularity how MOFCOM's failure to disclose the data beyond the narrative description resulted in the interested party being unable to defend its interests.[26]

36. The United States respectfully disagrees with this finding. Without a full disclosure of the *entirety* of the essential facts under consideration underlying the dumping determination, it is difficult to see how a party would be in a position to identify whether the determination contains clerical or mathematical errors, or whether the investigating authority actually did what it purported to do.[27] Such failure to provide this information would result in an interested party

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23 *EC – Salmon (Norway)*, para. 7.807.

24 *See EC – Salmon (Norway)*, para. 7.805.

25 Panel Report, para. 7.235.

26 *See* Panel Report, para. 7.236.

27 To the extent that the Panel relied on the fact that such data was already in the possession of a given respondent, this would not result in the disclosure of such essential facts to other respondents or the domestic industry.

being unable to defend its interests because it could not identify in the first instance the particular issues that are adverse to its interests.

37. Furthermore, the panel's statements in *China – Broiler Products* are instructive. In that dispute, the panel stated 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.[28] All of these are "essential" facts within the meaning of Article 6.9.

38. In sum, for the reasons set out above, the United States disagrees with the Panel that China complied with Article 6.9 of the AD Agreement to the extent that MOFCOM failed to make available to the interested parties the underlying data it used to determine the existence and margin of dumping, including the calculation of the normal value and export price for the respondents. Absent such a disclosure of the essential facts, the interested parties were unable to adequately defend their interests during the antidumping proceeding.

III. THE PANEL'S ANALYSIS REGARDING THE DETERMINATION OF DUMPING UNDER ARTICLE 2 OF THE *ANTI-DUMPING AGREEMENT*

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

39. China challenges the Panel's finding that China breached Article 2.2.2 of the AD Agreement in failing to determine an amount for administrative, selling, and general costs ("SG&A") on the basis of records and actual data pertaining to production and sales in the ordinary course of trade of the product in question.[29] In particular, the Panel concluded that MOFCOM improperly utilized data relating to two free sample sales (which MOFCOM had excluded for the purpose of establishing the cost of production) to establish SG&A.[30] As explained below, China does not present a convincing challenge to the Panel's conclusion that MOFCOM's SG&A determination was inconsistent with Article 2.2.2 of the AD Agreement.

40. 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 SG&A and for profits. Article 2.2.2 further provides that for purposes of Article 2.2:

> [T]he 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.

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28 *China – Broiler Products*, para. 7.91.
29 *See* China's Appellant Submission, paras. 93-113.
30 *See* Panel Report, paras. 7.64-7.67.

Thus, this first sentence of Article 2.2.2 provides that an investigating authority should, where possible, base SG&A and profit on sales of the like product made in the ordinary course of trade. 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.

41. 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.[31]

42. 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."[32]

43. 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, and thus should not be relied upon for purposes of establishing SG&A under the preferred method of Article 2.2.2. The AD Agreement does not require an investigating authority to treat all sample sales as outside the ordinary course of trade. But the investigating authority must evaluate the record evidence to determine whether that evidence 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.

44. The Panel in this dispute found that MOFCOM used SG&A data "based on the application of coefficients to data that had already been excluded for the purpose of constructing normal value."[33] As stated above, Article 2.2.2 requires that SG&A be based on actual data pertaining to production and sales in the ordinary course of trade where available. Thus, to the extent that MOFCOM relied on information that it had already excluded for being outside the ordinary course of trade when information on sales in the ordinary course of trade was available, the United States agrees with the Panel's findings that China acted inconsistently with Article 2.2.2 of the AD Agreement.

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31 *EC – Tube or Pipe Fittings (AB)*, para. 97.
32 *US – Hot-Rolled Steel (AB)*, paras. 140-141.
33 Panel Report, para. 7.66.

IV. THE PANEL'S ANALYSIS REGARDING THE DETERMINATION OF INJURY UNDER ARTICLE 3 OF THE *ANTI-DUMPING AGREEMENT*

A. The Panel Appropriately Found that an Investigating Authority May Consider the Significance of Price Undercutting by Subject Imports Separately from the Existence of Price Depression or Suppression

45. The Panel found that "[w]hile price undercutting by imports may lead to lost domestic sales, or price depression or price suppression, there is no requirement in Article 3.2 to demonstrate the existence of these other phenomena when considering the existence of price undercutting."[34] Contesting this finding, the EU and Japan contend that under Article 3.2 of the AD Agreement, investigating authorities may not find significant subject import price undercutting without also finding that the undercutting by dumped imports depressed or suppressed domestic like product prices to a significant degree.[35] As the United States understands the arguments made by the EU and Japan, those arguments are not supported by Article 3.2.

46. Article 3.2 of the AD Agreement requires investigating authorities to consider the significance of price undercutting by subject imports separately from the issue of whether subject imports depressed or suppressed domestic like product prices. Specifically, Article 3.2 of the AD Agreement provides that:

> 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, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree."

47. The Appellate Body explained in *China – GOES* that an investigating authority's obligation to consider price undercutting is separate and distinct from its obligation to consider "whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree."[36] The Appellate Body observed:

> The two inquiries . . . are separated by the words "or" and "otherwise". This indicates that the elements relevant to the consideration of significant price undercutting may differ from those relevant to the consideration of significant price depression and suppression."[37]

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34 Panel Report, para. 7.129.
35 *See* Japan's Appellant's Submission, paras. 31-32; EU's Other Appellant's Submission, para. 114.
36 *China – GOES (AB)*, para. 257.
37 *China – GOES (AB)*, para. 137.

As the Appellate Body emphasized, the use of the disjunctive indicates that authorities can find significant undercutting without finding significant price depression or suppression, or that they can find significant price depression or suppression without finding significant undercutting.

48. Indeed, it is possible for subject imports to significantly undercut domestic like product prices without also depressing or suppressing domestic like product prices to a significant degree. Confronted with significant price undercutting by subject imports, domestic producers may elect to maintain or increase their prices, as necessary to cover their costs, even as they lose sales and market share to lower-priced subject imports. In that case, an investigating authority would not find that subject imports depressed or suppressed domestic prices, but could nevertheless conclude that subject imports injured the domestic industry because the significant price undercutting enabled subject imports to capture market share from the domestic industry.

49. Alternatively, if there is limited substitutability between subject imports and the domestic like product, significant price undercutting by subject imports may have little or no effect on either domestic like product prices or domestic industry market share. It is also possible for subject imports to depress or suppress domestic like product prices without significantly undercutting domestic like product prices, as the Appellate Body has recognized.[38] Given these possibilities, it makes analytical sense that the Panel separated the price undercutting inquiry from the price depression/suppression inquiry under Article 3.2 of the AD Agreement.

50. Accordingly, the investigating authorities are required to consider whether there is price undercutting, as well as whether there is price depression or price suppression, but are not required to make any particular findings about any of these inquiries.[39] To the extent an authority relies on findings of any of these type of price effects, however, Article 3.1 of the AD Agreement requires that those findings be supported by positive evidence.

B. The Investigating Authority's Obligation in Examining the Impact of Dumped Imports on the Domestic Industry

51. The Panel rejected the EU and Japan's claim that MOFCOM's impact analysis was inconsistent with Article 3.4 of the AD Agreement because MOFCOM improperly considered the impact of subject imports on the domestic industry as a whole.[40] The Panel found that "in the context of price undercutting, the appropriate 'relationship between subject imports and the state of the domestic industry' exists when the state of the domestic industry shows injury, and the subject imports are sold at prices that undercut certain like products produced and sold by that industry."[41] Japan challenges these results on the grounds that the investigating authority is

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[38] *See China – GOES (AB)*, para. 137 ("[E]ven if prices of subject imports do not significantly undercut those of like domestic products, subject imports could still have a price-depressing or price suppressing effect on domestic prices.").

[39] *EC – Salmon (Norway)*, para. 7.638; *see also Thailand – H-Beams (Panel)*, para. 7.161; *US – Softwood Lumber VI*, para. 7.67.

[40] Panel Report, para. 7.153.

[41] Panel Report, para. 7.155.

obligated to examine whether subject imports provided "explanatory force" for the state of the domestic industry.[42] The EU concurs with Japan's arguments as to this issue.[43]

52. The United States agrees with the EU and Japan that the Panel committed legal errors in making these findings. The Panel incorrectly found that an investigating authority could determine that subject import price undercutting adversely impacted a domestic industry in accordance with Article 3.4 of the AD Agreement without establishing that the industry's declining performance was the effect of subject import price undercutting.

53. Article 3.4 of the AD Agreement specifies an authority's obligation to ascertain the impact of dumped imports on the domestic industry. The article provides that '[t]he examination of the impact of the 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 specific factors that an authority must include in its analysis:

> [A]ctual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

54. The text of Article 3.4 of the AD Agreement expressly requires investigating authorities to examine the impact of subject imports on a domestic industry, and not just the state of the industry. As used in Article 3.4, the term "impact" means "the force of impression of one thing on another" and "a concentrated force producing change."[44] Accordingly, an investigating authority's examination of "the impact of the dumped imports on the domestic industry concerned" would involve evaluating the extent to which the 'force' applied by subject imports on a domestic industry made an 'impression' on the industry or produced a change in the industry's performance.

55. As recognized by Articles 3.1 and 3.2 of the AD Agreement, subject imports generally influence a domestic industry's performance through volume effects, as where subject imports capture sales and market share from an industry, and through price effects, as where subject imports depress or suppress domestic like product prices. Thus, to examine the impact of subject imports on a domestic industry, an investigating authority would need to consider the relationship between subject imports – including subject import volume and market share, 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. Such an examination would necessarily encompass trends over the entire period of investigation because correlations between subject import trends and domestic industry performance trends over time

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42 *See* Japan's Appellant Submission, para. 41.

43 *See* EU's Other Appellant Submission, para. 159.

44 *Webster's Third New International Dictionary*, Unabridged, 1131 (2002).

would be highly relevant to an authority's impact analysis, and such trends would clearly constitute "relevant economic factors and indices having a bearing on the statue of the industry."

56. This interpretation is supported by the Appellate Body's observations in *China – GOES*:

> Articles 3.4 and 15.4 . . . do not merely require an examination of the state of the domestic industry, but contemplate that an investigating authority must derive an understanding of *the impact of* subject imports on the basis of such an examination. Consequently, Article 3.4 and 15.4 are concerned with the relationship between subject imports and the state of the domestic industry, and this relationship is analytically akin to the type of link contemplated by the term "the effect of" under Articles 3.2 and 15.2.[45]

57. The Appellate Body described "the type of link contemplated by the term 'the effect of' under Articles 3.2 and 15.2" as follows:

> By asking the question "*whether the effect of*" *the subject imports is* significant price depression or suppression, the second sentence of Articles 3.2 and 15.2 specifically instructs an investigating authority to consider whether certain price effects are the consequences of subject imports . . . The language of Articles 3.2 and 15.2 thus expressly links significant price depression and suppression with subject imports, and contemplates an inquiry into the relationship between two variables, namely, subject imports and domestic prices. More specifically, an investigating authority is required to consider whether a first variable—that is, subject imports—has explanatory force for the occurrence of significant depression or suppression of a second variable—that is, domestic prices. [46]

58. Thus, in examining "the relationship between subject imports and the state of the domestic industry" pursuant to Article 3.4 of the AD Agreement, an investigating 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.

59. Finally, the Appellate Body's recognition that an investigating authority may find significant subject import price undercutting without also finding significant price depression or suppression in no way absolves authorities of their obligation under Article 3.4 of the AD Agreement to examine "the relationship between subject imports and the state of the domestic industry" in cases where only price undercutting is found.[47] On the contrary, significant subject import price undercutting could be highly relevant to such an examination.

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45 *China – GOES (AB)*, para. 149.
46 *China – GOES (AB)*, para. 136.
47 See *China – GOES (AB)*, para. 149.

C. The Panel Appropriately Evaluated the Claims under Articles 3.1 and 3.5 of the AD Agreement Because Japan and the EU Both Properly Raised Independent Claims Under These Provisions

60. In the Panel proceedings, Japan and the EU claimed that MOFCOM's causation determination was inconsistent with Articles 3.1 and 3.5 of the AD Agreement because MOFCOM conducted flawed price effects and impact analyses.[48] China challenges the Panel's finding against MOFCOM under Articles 3.1 and 3.5 partly on grounds that the Panel allegedly ruled on a matter that was not before it and, alternatively, made the case for complainants.[49] China claims that the EU and Japan never raised these claims before the Panel and that, even if they did, the Panel erred by making a *prima facie* case for the complainants.[50] Japan and the EU's submissions make clear, however, that both Members raised independent claims under Articles 3.1 and 3.5, and advanced the very arguments the Panel accepted in finding MOFCOM's causal link analysis inconsistent with those articles.

61. In purporting to establish a causal link between subject imports and the domestic industry's condition, MOFCOM noted that subject import market share "remained high at around 50%" and concluded that this market share, coupled with subject import underselling with respect to Grades B and C, caused "the imports of the subject imports [to have] a relatively big impact on the price of the domestic like products."[51]

62. The Panel found this analysis inconsistent with Articles 3.1 and 3.5 of the AD Agreement because MOFCOM failed to "consider whether the fact that import market shares are declining significantly indicates that the price effects are in fact somewhat attenuated," given that subject import market share declined from 90 percent to 50 percent during the period of investigation.[52] Noting that subject imports consisted almost entirely of Grades B and C while the majority of domestic sales were of Grade A, the Panel also found that MOFCOM failed to explain "how the market shares of imports of Grade B and C HP-SSST are relevant in assessing whether subject imports caused injury to a domestic industry producing primarily Grade A HP-SSST"[53] or to establish the existence of cross-grade price effects.[54]

63. Japan and the EU each alleged in their respective Panel Requests that MOFCOM's causation analysis was inconsistent with Article 3.1 and 3.5 of the AD Agreement.[55] Japan and the EU also each argued in their respective first written submissions that MOFCOM violated Articles 3.1 and 3.5 of the AD Agreement by failing to consider that "the decrease in imports to China of HP-SSST has a high degree of explanatory force with respect to the proposition that

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48 *See* Panel Report, paras. 7.176-7.177.

49 *See* China's Appellant's Submission, paras. 165-195; China's Other Appellant's Submission, paras. 70-102.

50 *See* China's Appellant's Submission, paras.165-195; China's Other Appellant's Submission, paras. 70-102.

51 Panel Report, para. 7.171.

52 Panel Report, para. 7.181.

53 Panel Report, para. 7.182.

54 Panel Report, paras. 7.183-7.187.

55 *See* Panel Request of Japan, paras. 1(c) and (d); Panel Request of the European Union, paras. 5; *see also* Japan's Appellant's Submission, paras. 86-87; EU's Other Appellant's Submission, para. 162.

imports of HP-SSST did not cause injury to the domestic industry" and by "improperly extend[ing] its conclusions concerning the price undercutting effect of Products B and C to the domestic HP-SSST industry as a whole" without establishing cross-grade price effects.[56] Finally, in response to a Panel question, Japan and the EU each confirmed that they intended to raise independent claims under Articles 3.1 and 3.5 of the AD Agreement, encompassing MOFCOM's consideration of both the volume and price effects of subject imports in the context of causation.[57]

64. Thus, it appears that Japan and the EU each raised independent claims under Article 3.5 of the AD Agreement, as well as arguments seeking to establish *prima facie* violations of that article, which the Panel appropriately considered and accepted.[58] The Appellate Body should therefore reject China's argument.

V. CONCLUSION

65. The United States appreciates the opportunity to provide its views in this appeal and hopes that its comments will be useful to the Appellate Body.

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[56] EU's First Written Submission, paras. 295-296; *see also id*., paras. 243-246, 293-297; Japan's First Written Submission, paras. 148-150, 202-206.

[57] *See* Japan's Appellant's Submission, para. 96; EU's Other Appellant's Submission, para. 163.

[58] China's argument that Japan and the EU never raised or argued these claims is largely based on the Panel's incomplete summary of Japan's and the EU's arguments with respect to Article 3.5 of the AD Agreement. *See* China's Appellant Submission, para. 170; China's Other Appellant Submission, para. 75. Although the Panel summarized Japan's and the EU's arguments that MOFCOM's causation analysis conflicted with the significant decline in subject import market share, the Panel did not summarize their arguments that MOFCOM improperly extended its analysis of price undercutting by subject imports of Grades B and C to domestic industry sales of Grade A. *See* Panel Report, paras. 7.176-7.177. Notwithstanding this omission, the Panel's analysis of the issue closely tracked Japan's and the EU's respective arguments that MOFCOM's failed to establish cross-grade effects, or that price undercutting by subject imports of Grades B and C adversely impacted domestic industry sales of Grade A. *Compare* Panel Report, paras. 7.182-7.187 *with* EU's First Written Submission, paras. 243-246, 293-297; Japan's First Written Submission, paras. 148-150, 202-206. Thus, the Panel in no way "made arguments on the complainant's behalf and made the case for the complainant," as China alleges. *See* China's Appellant Submission, para. 191; China's Other Appellant Submission, para. 98.