EUROPEAN COMMUNITIES – DEFINITIVE ANTI-DUMPING MEASURES ON CERTAIN IRON OR STEEL FASTENERS FROM CHINA

RECOURSE TO ARTICLE 21.5 OF THE DSU BY CHINA

(DS397)

EXECUTIVE SUMMARY OF THE THIRD PARTY SUBMISSION AND THIRD PARTY STATEMENT OF THE UNITED STATES OF AMERICA

December 5, 2014

EXECUTIVE SUMMARY OF U.S. THIRD-PARTY SUBMISSION

I. China's Claims Under Article 6 of the AD Agreement

A. Article 6.5

1. The United States disagrees with China's assertion that that "information routinely provided to potential customers…*cannot* be by nature confidential," as a categorical matter, for purposes of Article 6.5 (emphasis added). China's position is not supported by the text of Article 6.5. The article is clear in stating that information is "by nature confidential" where, *inter alia*, "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…" The text of the provision contains no carve out, as China proposes, for confidential information provided to potential customers. Indeed, the United States can envision commercial scenarios where proprietary information is routinely provided to potential customers, perhaps with the proviso that the information not be further disclosed by the recipient.

B. Article 6.5.1

2. The first sentence of Article 6.5.1 makes clear that the requirement to "furnish non-confidential summaries" applies *only* to information submitted by "interested parties." China, however, has not established that Pooja Forge is an "interested party" for purposes of the AD Agreement.

3. The phrase "interested parties" is expressly defined in Article 6.11 of the AD Agreement. The definition set forth in Article 6.11 applies to the AD Agreement *as a whole*, including therefore to Article 6.5.1. Pooja Forge does not fall under any of the "interested party" categories listed in Article 6.11. That is, Pooja Forge is (i) not an exporter or foreign producer of the product subject to investigation, (ii) not the government of the exporting Member (*i.e.*, China), and (iii) does not reside in the territory of the importing Member (*i.e.*, in the EU). Moreover, in its submission China made no attempt to establish that Pooja Forge met the definition of "interested party" as defined in Article 6.11.

4. Therefore, because Pooja Forge does not appear to be an "interested party" for purposes of the AD Agreement, the United States disagrees with China's assertion that the European Union was obligated, by virtue of Article 6.5.1, to require that Pooja Forge furnish non-confidential summaries of information submitted to the EU Commission.

C. Articles 6.2 and 6.4

5. In an antidumping investigation, the ability of an interested party to defend its interests is especially critical with respect to information related to the calculation of normal value and the price comparisons that are conducted. The United States thus agrees with the Appellate Body's decision in *EC – Pipe Fittings*, where the Appellate Body recognized that the relevancy of information covered by Article 6.4 is to be determined from the perspective of the interested parties, not the investigating authority.

6. Accordingly, Article 6.4 generally requires that an investigating authority give interested parties access to *all* non-confidential information submitted during an investigation that an interested party could view as relevant to the presentation of their positions or the outcome of the investigation. Failure to provide such access is not only inconsistent with Article 6.4, but also Article 6.2, because without access to information described in Article 6.4, interested parties are necessarily denied "a full opportunity for the defense of their interests."

7. The United States takes no position on whether the information at issue was properly accorded confidential treatment under Article 6.5. To the extent that confidential treatment was not properly accorded, the United States is of the view that the EU Commission was obligated, under Article 6.4, to make such information available to Chinese exporters during the review investigation, and in a timely fashion. On the other hand, if the information from the Indian producer was properly accorded confidential treatment under Article 6.5, Article 6.4 would not require disclosure of such information.

8. Nonetheless, even if the information provided by the Indian producer could not be disclosed in full, this does not mean that the EU Commission could conduct an investigation in a manner that completely denied the respondents any opportunity to participate meaningfully in the investigation or to defend their interests as contemplated in Article 6.2 of the AD Agreement. The United States recalls that it was the choice of the EU Commission to rely on confidential information from a party that was not an "interested party" under Article 6.11. If the EU decided to rely on such information, and if access to such information was necessary for the respondents to participate meaningfully or defend their interests in the investigation, the United States understands Article 6.2 to require that an authority adopt some sort of mechanism that would allow the respondents an opportunity to do so. For example, perhaps the Commission could have provided its own summary of the information obtained from the Indian producer, or could have disclosed the information under a narrowly-drawn protective order (*see* AD Agreement, note 17).

D. Article 6.1.2

9. The United States believes that transparency is a key principle reflected in the provisions of the AD Agreement, including Article 6.1.2. Accordingly, the United States is of the view that transparency is best ensured by requiring all non-confidential information presented to, or obtained by an investigating authority to be on the record of antidumping proceedings, and should be made available to all interested parties.

10. The United States, however, disagrees with China's further suggestion that where a party presents evidence to an investigating authority that party is, *ipso facto*, an "interested party" for purposes of Article 6.1.2. Specifically, China argues that Pooja Forge "should be regarded as an 'interested party' for purposes of Article 6.1.2" *because* Pooja Forge submitted evidence used by the EU Commission during the antidumping investigation.

11. As discussed above, however, the phrase "interested parties", is expressly defined in Article 6.11 of the AD Agreement. Simply put, a "party that provides information to investigating authorities" is *not* among the list of "interested parties" listed in Article 6.11. Thus,

the fact that a party provides information to an investigating authority does not *ipso facto* render said party an "interested party" for purposes of the AD Agreement.

II. China's Claims under Article 2 of the AD Agreement

A. Claim That European Union Failed To Provide Relevant Information Regarding The Products Of The Indian Analogue Producer

12. The United States understands Article 2.4 as generally obligating an investigating authority to solicit information regarding what differences in physical characteristics affect price comparability. The investigating authority can fulfill this obligation by asking interested 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. Taking into consideration the responses the parties provide and the investigating authority's own analysis of the record evidence, the investigating authority may then develop appropriate product comparison criteria for the dumping margin calculation.

13. An investigating authority must exercise transparency with respect to the products used in the determination of normal value, the considered physical differences between those products, and how those differences informed the investigating authority's determination of price comparability and ultimately normal value. This transparency obligation is found in the provisions of Article 6 of the AD Agreement, and is reinforced by the last sentence of Article 2.4. The United States understands that transparency within the confines of Article 2.4 requires an investigating authority to provide the necessary information regarding the products and transactions at issue so that the parties can provide relevant information and argument in response. Failure to ensure transparency in this context could prevent an interested party from being able to meaningfully defend its interest.

14. The United States therefore agrees with the statement of the Panel and Appellate Body in this dispute that "without knowing what constituted product types, it would be difficult if not impossible, for foreign producers to request adjustments that they consider necessary in order to ensure a fair comparison."

15. To the extent that the EU Commission, as alleged, has not provided Chinese exporters with information on the full range of product characteristics considered in the Commission's assessment of price comparability, the United States finds it difficult to see how the Commission could have met its obligation to conduct a fair comparison with respect to physical differences.

B. Claim That The European Union Improperly Grouped Standard And Special Fasteners In Its Determination Of Normal Value.

16. The United States understands that a mere statement by an investigating authority that a certain product grouping is defined the same in both markets, without providing further information, is likely to be inconsistent with the requirements of Article 2.4. In addition, without knowing the details of the comparison product, the party may have no way of knowing whether a

standard product (or special product) in the export market is defined under the same parameters as a standard product (or special product) in the comparison market.

C. Claim That The European Union Failed To Make Warranted Adjustments For Differences That Affected Price Comparability

17. The Appellate Body has stated that, "under Article 2.4, the obligation to ensure a 'fair comparison' lies on the investigating authorities, and not the exporters. It is those authorities which, as part of their investigation, are charged with comparing normal value and export price and determining whether there is dumping of imports." It is important to understand, however, that although the investigating authority has a burden to ensure a fair comparison, the interested parties also have the burden to support any requested adjustments for differences that affect price comparability.

18. Thus, when requesting adjustments to reflect the "due allowance" within the meaning of Article 2.4, an interested party is responsible for explaining to the investigating authority why such adjustment is warranted. Moreover, while the investigating authority is required to make "due allowance" for differences that affect price, Article 2.4 does not require the authority to accept, without evaluation, an interested party's argument that a certain difference affects price comparability and that adjustment is thereby warranted.

EXECUTIVE SUMMARY OF U.S. THIRD-PARTY STATEMENT

I. Exclusion of One or More Export Transactions

19. The United States does not agree with China that an administering authority breaches Article 2.4.2 unless each and every export transaction is included in a weighted average to weighted average comparison methodology. This view is too extreme, and does not reflect the text of the agreement or the realities of the administration of anti-dumping measures. On the other hand, the other extreme – such as basing a dumping margin on just one export transaction out of a thousand total export transactions – would also not be appropriate. As the United States will describe, the text of the agreement does provide guidance on instances where certain export transactions might be excluded from a margin calculation.

20. Turning first to Article 2.4.2, the text provides that "margins of dumping…shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions…." Notably, the text limits the comparison to "comparable" export transactions, which clearly indicates that this requirement does not extend to "all" export transactions. Indeed, if WTO Members had intended for the requirement to extend to "all transactions", they would have not limited Article 2.4.2 by including the modifier "comparable" before the term "export transactions."

21. The Appellate Body has also interpreted the text of Article 2.4.2 in this manner. In particular, the Appellate Body has recognized that this provision allows investigating authorities to use "multiple averaging" under the weighted average-to-weighted average comparison

methodology. Under this approach, an investigating authority can divide transactions into groups according to model or product type.

22. The basic definition of dumping is set out in Article 2.1 of the AD Agreement, and Article 2.2 sets out the basic rules covering the situation where a "proper comparison" cannot be made between export price and the price of the like product in the domestic market. Further, Article 6.10 provides important context, and indicates a number of factors which may be relevant when certain export transactions are excluded. To recall, Article 6.10 provides "where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable" the investigating authority "may limit [its] examination… to a reasonable number of….products by using samples which are statistically valid on the basis of information available to the authorities at the time of the selection, or to the largest percentage of the volume of the exports from the country which can reasonably be investigated." From this language, at least the following factors may be relevant in examining a situation where certain export transactions are excluded.

23. First, the number of different types of products is relevant; a large number of different types may support a limitation of the examination. Second, the difficulties involved in conducting an investigation of each and every product type are a relevant factor. The text notes that one consideration is whether an examination of each export sale is "impracticable." And at the end of this second sentence of Article 6.10, the language repeats this theme, noting that the limitation of an examination may be tied to what "can reasonably be investigated." Third, where the examination is so limited, the authority must still examine a "reasonable" number. Fourth, the text indicates that what is a "reasonable" number may depend on whether the examined transactions represent a statistically valid sample. Fifth, the text also indicates that the percentage of the total volume of exports investigated is relevant, and is tied to what can "reasonably" be investigated. Sixth, Article 6.10.1 states that it is "preferable" for any selection of product types to be made "in consultation with, and the consent of," the exporters, producers or importers concerned.

24. The United States suggests that the Panel apply these types of factors in examining China's claim with respect to the EU's exclusion of certain export sales. Because this involves a close examination of the facts and circumstances of the dispute, the United States takes no position on the ultimate question of whether China has made out its claim with respect to the exclusion of certain sales. Nonetheless, the United States does note its agreement with the EU that in the circumstances of this case, one particularly important factual circumstance is that China is a nonmarket economy. As a result, the EU was not able to rely on prices charged in China's domestic market, and was required to employ information from an analogue country. The use of this type of methodology appears to have made it more difficult for the EU to examine all product types.

II. Alleged Differences in Production Costs

25. China claims that the EU acted inconsistently with Article 2.4 of the AD Agreement in failing to make adjustments for alleged differences relating to the production of fasteners in China and the production of fasteners in India, which was the analogue country used by the EU.

26. As an initial matter, the United States notes that the issue raised by China is not governed by Article 2.4. By its plain terms, Article 2.4 sets forth the obligation of an investigating authority to make a "fair comparison" between the export price and the normal value. In the investigation at issue, the export price of course is the price to the EU, and the basis of normal value – under the EU's analogue country methodology – were domestic sales in India by an Indian producer. Here, China's complaint is not with respect to physical differences, or differences in terms of sale, between the sales to the EU and the domestic sales in India. Rather, China raises a completely different issue, regarding – in essence – whether the domestic sales in the analogue country were an appropriate basis of normal value.

27. Furthermore, Article 2.4 provides 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, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability." But here, China is alleging difference in production costs between China and the analogue country (India); such alleged cost differences do not themselves affect "price comparability" between sales of two sets of products. Rather, these alleged differences go to the issue of whether or not the Indian domestic sales are an appropriate surrogate for normal value.

28. Turning to the merits of China's factual assertions, we agree with the EU that an investigating authority may determine that normal value cannot be based on sales in a nonmarket economy because of, *inter alia*, a distorted market for raw materials, and that making adjustments to the dumping calculation based on such distortions would be inappropriate. Accordingly, China's argument is fundamentally circular.

29. China argues that India is not an appropriate analogue country because of alleged differences – as compared to China – in costs of raw materials and electricity. However, China fails to acknowledge that the very reason the EU has resorted to India as an analogue country is that the costs in China are distorted because China is a nonmarket economy. Accordingly, any calculation of the "true" costs in China – that is, the costs that would have been incurred if China were a market economy – are not knowable. Thus, in the facts of this dispute, it appears that China cannot establish that costs in China would be lower – or for that matter higher – than the costs incurred by the Indian producer.

30. In short, China's argument, if accepted, would defeat the underlying purpose of not relying on cost and sales data from a nonmarket economy.