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 ORAL STATEMENT OF THE UNITED STATES OF AMERICA

July 30, 2015

Mr. Chairman, members of the Division:

1. The arguments raised by Japan, the European Union ("EU"), and China concern fundamental obligations under the AD Agreement[1] and the DSU.[2] We have commented on a number of these systemic issues in our submission and will briefly highlight a few of those today.

I. 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. Our first point addresses the EU's appeal relating to the interpretation of Articles 6.5 and 17.7 of the AD Agreement as they relate to Business Confidential Information ("BCI").

3. As an initial threshold matter, the United States would emphasize that the Panel's decision regarding the handling of BCI under Articles 6.5 and 17.7 is *not* under appeal by any of the parties. To the contrary, while the EU raises certain BCI issues in this appeal, the EU has, in fact, *accepted* the Panel's changes to the BCI Procedures. We are thus faced with an odd situation where the EU is not seeking any further amendments to the BCI Procedures or their adoption on appeal, but where the EU is asking the Appellate Body to opine on certain statements in the Panel's reasoning that are of concern to the EU.

4. The Appellate Body should decline this invitation. Nothing in the DSU requires the Appellate Body to undertake analyses and issue advisory opinions on matters that have no effect in terms of resolution of the dispute. To the contrary, the Appellate Body could "address," to use the term in Article 17.12 of the DSU, this issue raised by the EU by explaining that the matter raised does not affect the outcome and, accordingly, that the Appellate Body is exercising judicial economy with respect to this claim. This approach would be particularly appropriate in the current circumstances, where the Appellate Body is faced with, *inter alia*, concurrent appeals and a substantial workload.[3]

5. To the extent the Appellate Body were nonetheless to examine the Panel's interpretation of Articles 6.5 and 17.7 of the AD Agreement, the United States wishes to emphasize that any interpretation of these provisions under which Members would be expected to provide the panel and other WTO Members confidential information without the permission of the submitter

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

[2] *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU").

[3] *See* Letter from P. Van den Bossche, Chair of the Appellate Body, to Ambassador H. Neple, Chair of the Dispute Settlement Body (July 19, 2015) (explaining the delay in circulation of the DS454/DS460 appellate reports due to the Appellate Body's "substantial workload this year, with several appellate proceedings in parallel, often with overlap in the composition of the Divisions hearing the different appeals", "the number and complexity of the issues raised on appeal in DS454 and DS460 and parallel proceedings, and scheduling issues arising from the circumstances referred to above as well as shortage of staff in the Appellate Body Secretariat").

would raise serious systemic concerns.[4] BCI information collected during an antidumping investigation often includes some of a company's most sensitive data related to pricing, production costs, sales, and customers. Article 6.5 of the AD Agreement provides that such information "shall not be disclosed." Under the ordinary, and a common sense, meaning of this phrase, sharing such highly sensitive information with panelists and officials of an international organization and with other WTO Members would constitute "disclosure" of that information. Indeed, under footnote 17 of the AD Agreement, "disclosure" encompasses provision of information "pursuant to a narrowly-drawn protective *order*" – that is, under enforceable rules to protect such information, such as approved individuals, restrictions on handling, and domestic penalties for violations.

6. Article 17.7, particularly when read in the context of Article 6.5, does not require the unauthorized disclosure of confidential information to WTO panels or other WTO Members. Indeed, Article 17.7 specifically addresses the treatment of any "confidential information *provided* to the panel." It thus contemplates that there may well be confidential information – such as where the submitter does not consent to disclosure – that has *not* been provided to the panel.

7. Turning now to the specific arguments presented by the EU, the United States finds it very hard to understand exactly what it is in the panel report to which the EU objects. But the United States does note that the EU's discussion conflates two different, albeit somewhat related, issues pertaining to confidentiality: (1) the investigating authority's confidentiality obligations under the AD Agreement during its investigations; and (2) a panel's discretion under Article 12.1 of the DSU to adopt BCI procedures in a WTO dispute settlement proceeding. Looking at either AD Agreement or DSU provisions, however, the panel would likely have to treat disputed BCI as confidential during the panel process. This has to be true for at least two reasons. First, what if the panel were to release information claimed to be BCI under the AD Agreement because the panel found that the standard of the AD Agreement was not met, but the Appellate Body then reversed the finding? Second, it is up to Members – not panels – to decide how DSB findings, including those related to treatment of information as confidential, should be implemented.

8. The proper functioning of trade remedy proceedings requires the protection of confidential information. The parties to an investigation need to have confidence that any confidential information they submit will not – without their consent – be disclosed to other persons, governments, or entities. Otherwise, parties may be deterred from disclosing confidential information to the investigating authorities.

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

9. We now turn to the issue of what an investigating authority must include in its determination when the authority accepts a request for confidential treatment of certain information. The United States takes no position on whether the facts presented in this dispute

[4] *See* U.S. Third Participant Submission, paras. 14-15.

support a conclusion that China improperly treated information as confidential. However, to the extent that the Panel's findings may be read so as to impose additional obligations of explanation on the part of the investigating authority, the United States maintains that no such obligations can be supported by the AD Agreement.[5]

10. Pursuant to Article 6.5, and as past reports have clarified, an investigating authority "must objectively assess the 'good cause' alleged for confidential treatment."[6] However, Article 6.5 does not obligate the investigating authority to provide a separate or detailed explanation whenever the authority accepts a claim of confidential treatment. Further, nothing in the standard of review employed in trade remedy disputes leads to an unwritten obligation for an authority to provide such explanations. Indeed, in *US – Countervailing Duty Investigation on DRAMS*, the Appellate Body noted that the level of explanation required for the operation of the standard of review turns on the substantive provision at issue.[7]

11. In many trade remedy proceedings, the merits underlying the grant of confidential treatment will be plain on the face of the record of a proceeding. For example, the authority may set up a procedure in which parties requesting confidential treatment may certify that specific information is confidential because it is not publicly available and the release will cause harm to the submitter. Where a party submits such a request, for example, involving sensitive information such as costs, or prices given to specific customers, the good cause for confidential treatment is plainly evident. In such situations, it would be a major departure from the text of the AD Agreement to require a separate and detailed explanation whenever an authority accepts a plainly reasonable request for confidential treatment.

II. CONCLUSION

12. We thank the Division for its attention and look forward to discussing these and other matters in the course of this hearing.

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5 *See* China's Appellant Submission, paras. 286-290.

6 *EC – Fasteners (China) (AB)*, para 539.

7 *US – Countervailing Duty Investigation on DRAMS (AB)*, para. 165 (noting the "evidence [reviewed by the panel] was on the record of the investigation and it was not put before the Panel in support of a new reasoning or rationale").