



WORLD TRADE
ORGANIZATION

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NOTICES OF APPEAL AND OTHER APPEAL

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ANNEX A-2

CHINA'S NOTICE OF OTHER APPEAL *

1. Pursuant to Article 16.4 and Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") and Rule 23 of the Working Procedures for Appellate Review, the People's Republic of China ("China") hereby notifies its decision to appeal to the Appellate Body certain issues of law covered in the Report of the Panel in *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China (Recourse to Article 21.5 of the DSU by China)* (WT/DS397/RW) ("Panel Report"), and certain legal interpretations developed by the Panel in that Report.

2. Pursuant to Rules 23(1) and 23(3) of the Working Procedures for Appellate Review, China

interpretation and application of Article 2.4 of the AD Agreement and failed to comply with its functions as required by Article 11 of the DSU when finding that the European Union did not violate Article 2.4 by rejecting the Chinese producers' requests for adjustments for differences with regard to "easier access to raw materials", "use of self-generated electricity", and "efficiency and productivity" which affected price comparability.² In that respect, China has identified, *inter alia*, the following errors in the issues of law and legal interpretations developed by the Panel:

- The Panel erred in finding that the Commission was not obliged to make adjustments to reflect differences in costs because the analogue country methodology was used;
- The Panel erred in its application of Article 2.4 in finding that the Chinese producers did not show that the alleged differences in costs affected price comparability;
- The Panel failed to make an objective assessment of the facts, as required under Article 11 of the DSU, by failing to address all aspects of China's claim and by failing to consider the evidence presented by China in its totality.

8. China requests the Appellate Body to reverse these Panel's findings and conclusions and to find that the European Union acted inconsistently with Article 2.4 of the AD Agreement.

3 REVIEW OF THE PANEL'S FINDINGS WITH RESPECT TO CHINA'S CLAIMS UNDER ARTICLE 2.4 OF THE AD AGREEMENT CONCERNING THE EUROPEAN UNION'S FAILURE TO MAKE ADJUSTMENTS FOR DIFFERENCES IN PHYSICAL CHARACTERISTICS

9. In case the Appellate Body were to reverse the Panel's findings that the European Union violated Article 2.4 of the AD Agreement by failing to provide the Chinese producers with information regarding the characteristics of Pooja Forge's products that were used in determining normal values, China requests the Appellate Body to review the Panel's findings under Article 2.4 with respect to the European Union's failure to make adjustments for differences in physical characteristics.³

10. In that regard, China requests the Appellate Body to reverse the Panel's findings and to find that the European Union violated Article 2.4 as it failed to make adjustments for differences in physical characteristics both included and not included in the original PCNs.

4 REVIEW OF THE PANEL'S FINDINGS WITH RESPECT TO CHINA'S CLAIM UNDER ARTICLE 6.1.2 OF THE AD AGREEMENT CONCERNING THE EUROPEAN UNION'S FAILURE TO ENSURE THAT THE INFORMATION PROVIDED BY POOJA FORGE WAS MADE AVAILABLE PROMPTLY TO THE CHINESE PRODUCERS

11. China seeks review by the Appellate Body of the Panel's findings and conclusions concerning China's claim that the European Union violated Article 6.1.2 of the AD Agreement by failing to ensure that the information provided by Pooja Forge concerning the list and characteristics of its products was made available promptly to the Chinese producers.⁴

12. The Panel erred in its interpretation of the term "interested parties" as included in Article 6.11 in considering that the status of "interested parties" is dependent on a decision of the investigating authorities which must appear in the investigation record and in stating that such decision is made at the request of the party concerned. The Panel also erred in its interpretation and application of Article 6.1.2 in concluding that the obligation in Article 6.1.2 only applies to those parties which are "interested parties" under Article 6.11.

13. China requests the Appellate Body to reverse the Panel's findings and conclusions and to find that the European Union violated Article 6.1.2 of the AD Agreement by failing to ensure that the information provided by Pooja Forge was made available promptly to the Chinese producers.

5 REVIEW OF THE PANEL'S FINDINGS WITH RESPECT TO CHINA'S CLAIM UNDER ARTICLE 6.5.1 OF THE AD AGREEMENT

14. If the Appellate Body reverses the Panel's findings and conclusions that the European Union violated Article 6.5 of the AD Agreement by treating as confidential the information submitted by Pooja Forge regarding the list and characteristics of its products and instead finds that the European Union did not violate Article 6.5 of the AD Agreement, then China requests the Appellate Body to complete the analysis of China's claim under Article 6.5.1 of the AD Agreement for which the Panel did not make findings.⁷

15. More specifically, China requests that the Appellate Body finds and concludes that the European Union violated Article 6.5.1 of the AD

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ARGUMENTS OF THE PARTICIPANTS

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ANNEX B-1

EXECUTIVE SUMMARY OF THE EUROPEAN UNION'S APPELLANT'S SUBMISSION

1.1 The Panel erred by finding that China's claims under Articles 6.5, 6.4, 6.2, 6.1.2, 2.4, 4.1 and 3.1 of the AD Agreement fell within its terms of reference

1. The European Union submits that the Panel erred in the interpretation and application of Article 21.5 of the DSU and also failed to comply with its functions as required by Article 11 of the DSU when finding that China's claims under Article 6.5, 6.4, 6.2, 6.1.2, 2.4, 4.1 and 3.1 of the AD Agreement fell within its terms of reference. As a result, the European Union requests the Appellate Body to *reverse* the Panel's findings in paragraphs 7.34, 7.80, 7.114, 7.115, 7.171, 7.291, as well as 8.1(i)-(iii) and (v) of its Report.
- 2.

Response, including the categories of products sold (i.e. Pooja Forge's product characteristics), China was prevented from raising the same claim against the same facts which remained unchanged in the review investigation (i.e. the treatment as confidential of certain information submitted by Pooja Forge regarding the products sold in India). This issue did not bear any close relationship with the original DSB's recommendations and rulings. Simply, there were no recommendations or rulings on this matter, since China failed to prove its case. Allowing China to raise the same matter again in the context of these compliance proceedings precisely would confer a "second chance" to re-open the same issue which was discussed in the original proceedings, i.e. the treatment as confidential of the information provided by Pooja Forge, including its product types.

1.1.1.2 The Panel made an error when finding that China's claim under Article 6.2 and 6.4 of the AD Agreement was within its terms of reference

5. The information provided by Pooja Forge with respect to its products sold in India was not "new". In the review investigation, the European Commission based itself on the data which Pooja Forge had provided in the context of the original investigation. Further, in the original investigation, the Chinese exporting producers repeatedly requested to see the categorisations or product types on the basis of which Pooja Forge had provided information. This aspect, therefore, was not "new". The Panel failed when considering that this information was "new" and hence a new aspect in the measure taken to comply. In addition, the European Union considers that, had the Panel followed the guidance set out by the Appellate Body in *US – Zeroing (Article 21.5 – EC)*, the Panel should have concluded that this aspect of the review investigation did not change when compared to the original investigation (since it was based on the same information) and that such aspect was separable from the measure taken to comply, in light of the relevant DSB's recommendations and rulings.

1.1.1.3 The Panel made an error when finding that China's claim under Article 6.1.2 of the AD Agreement was within its terms of reference

6. The Panel erred in the interpretation and application of Article 21.5 of the DSU when examining the European Union's objection against China's claim under Article 6.1.2 of the AD Agreement. The reasons mentioned by the European Union in Section 3.2.4 also apply here *mutatis mutandi*. The European Union further takes issue specifically with the following factual finding made by the Panel in paragraph 7.114: "[w]e also recall that Pooja Forge provided information on coating during the review investigation [referring to Exhibit EU-6]". The European Union considers that the Panel erred under Article 11 of the DSU when

producers' cases and used by the Commission. The European Union further submits that the Panel erred in the interpretation and application of Article 6.2 of the AD Agreement when finding that the Commission violated this provision by not allowing the Chinese producers to see the information on the file regarding the list and characteristics of Pooja Forge's products.

25. Article 6.4 of the AD Agreement applies to information that meets three conditions: (i) the information has to be relevant to the presentation of the interested parties' cases; (ii) it should not be confidential as defined in Article 6.5; and (iii) it must have been used by the investigating authority.
26. With respect to condition (i): first, the fact that an interested party requests certain information cannot be equated with the determination that such information is "relevant". Second, the information about the list and characteristics of Pooja Forge's products the Chinese producers were asking for did not concern directly the dumping calculations. That part of the information which indeed did concern the dumping calculations was provided to the Chinese producers. In addition, the Chinese exporting producers could have made requests on the basis of the company specific disclosures.
27. With respect to condition (ii): the Panel erred when automatically concluding that an alleged error made by the European Union in assessing such information meant that the information itself was not confidential in the meaning of the second condition under Article 6.4.
28. With respect to condition (iii): the mere fact that information "relates" to a particular issue that is before the investigating authority does not establish that the information was "used" by the authority in making its determination. That information as a whole (as opposed to more specific parts of it) was not used by the Commission.
29. The Panel wrongly considered that providing this information at the time of the company specific disclosures was too late. The Chinese exporters, however, were given three weeks to make comments on the disclosure, including the possibility of asking for adjustments - preceded by three months of an active dialogue.
30. The Panel also found that the Commission violated Article 6.2 by not allowing the Chinese producers to see the information on the file regarding the list and characteristics of Pooja Forge's products. The European Union submits that this finding is in error for similar reasons as those mentioned before in the context of Article 6.4.
31. In light of the foregoing, the European Union requests the Appellate Body to reverse the Panel's findings in paragraphs 7.92, 7.96 and 8.1(ii) of its Report.

1.4 The Panel erred when finding that the Commission violated Article 2.4 of the AD Agreement by failing to provide the Chinese producers with information regarding the characteristics of Pooja Forge's products that were used in determining normal values in the investigation at issue

32. The European Union submits that the Panel erred when finding that the Commission violated Article 2.4 of the AD Agreement by failing to provide the Chinese producers with specific product data regarding the characteristics of Pooja Forge's products that were used in determining normal values in the investigation at issue.
33. In particular, the Panel committed a legal error by turning the "fair comparison" requirement

analogue country producer needs to be disclosed to the interested parties. There is no basis for this requirement in the text of Article 2.4 of the AD Agreement or in the original Appellate Body Report.

34. Article 2.4 of the AD Agreement requires that the interested parties be informed of the approach adopted by the investigating authority for ensuring a fair comparison and of the characteristics of the product groupings that will be used for purposes of the dumping

40. *Fourth*, the European Union also considers that the Panel erred in law in suggesting that the obligation in Article 2.4 differs based on whether one or another permissible normal value methodology is used. There is no basis in the text of the AD Agreement or China's accession protocol for the Panel's finding that in investigations involving NME countries, Article 2.4 imposes a different and more far reaching disclosure obligation. What the Appellate Body required under the procedural requirement of Article 2.4 was that the Commission would enter into an active dialogue with Chinese producers. That is what the Commission did. The Appellate Body made this finding in the context of this NME investigation. The Appellate Body did not find that in an NME investigation Article 2.4 imposes additional obligations on investigating authorities.
41. *Fifth*, the Panel also erred when it found that the confidential nature of the information should not have prevented the Commission from disclosing a summary of the product information. The European Commission disclosed all of the necessary information on the product groupings (including the detailed product characteristics) that were used in the normal value determination to each of the Chinese exporters and engaged in an active dialogue with the Chinese interested parties, as required by Article 2.4 of the AD Agreement. In so doing, the European Commission fully implemented the recommendations and rulings of the DSB and complied with its obligations under Article 2.4 of the AD Agreement
42. The European Union therefore requests the Appellate Body to reverse the Panel's findings of violation in paragraphs 7.148, 7.149 and 8.1(iii) of its Report.

1.5 The Panel erred when finding that the Commission violated Article 2.4.2 of the AD Agreement by not taking into consideration, in its dumping determinations, Chinese producers' exports of models that did not match any of the models sold by Pooja Forge

43. The European Union submits that the Panel erred when finding that the Commission violated Article 2.4.2 of the AD Agreement by not taking into consideration, in its dumping determinations, Chinese producers' exports of models that did not match any of the models sold by the Indian analogue country producer Pooja Forge. The Panel ignored the term "comparable" in Article 2.4.2 and failed to interpret the requirement of Article 2.4.2 in the context of the overarching "fair comparison" obligation of Article 2.4 which distinguishes this situation from the one addressed in the zeroing disputes. The Commission applied a neutral methodology that included all comparable export transactions for which there was a comparable domestic sale. The European Union therefore requests that the Panel's findings in paragraphs 7.276 and 8.1(iv) be reversed.
44. The obligation in Article 2.4.2 is to compare only comparable transactions but to make sure to compare and use all of such comparable transactions. That is exactly what the European Commission did. The European Commission included only the comparable export transactions in its dumping calculation in order to ensure the accuracy of the calculations. In so doing, the European Commission included all comparable export transactions in the dumping margin determination and did not exclude any comparable transactions or otherwise sought to skew the averaging that followed the model-to-model comparison as had been the issue in the zeroing disputes. There is therefore nothing "inherently unfair" about this approach. The Panel did not find otherwise. The evidence presented by the European Union showed that both qualitatively and quantitatively the amount of matching sales was such as to ensure a fair comparison between comparable sales. The European Commission excluded some export transactions from its dumping calculation, because including them would have resulted in inaccurate findings based on non-comparable

application of Article 2.4.2 of the AD Agreement and the Panel's findings in paragraphs 7.276 and 8.1(iv) should thus be reversed.

1.6 The Panel erred when finding that by defining the domestic industry on the basis of domestic producers that came forward in response to a notice of initiation which stated that only those producers willing to be included in the injury sample would be considered as cooperating, the Commission acted inconsistently with Article 4.1 of the AD Agreement and consequently with Article 3.1 of the AD Agreement

46. The European Union submits that the Panel erred when finding that by defining the domestic industry on the basis of domestic producers that came forward in response to a notice of initiation which stated that only those producers willing to be included in the injury sample would be considered as cooperating, the Commission acted inconsistently with Article 4.1 of the AD agreement and consequently with Article 3.1 of the AD Agreement. In fact, the Panel recognised that the Commission implemented the finding of the Appellate Body by including all producers that came forward within the deadline. However, its ultimate contrary

definition of domestic industry was inconsistent with Article 4.1 of the AD Agreement and

ANNEX B-2

EXECUTIVE SUMMARY OF CHINA'S OTHER APPELLANT'S SUBMISSION

1 INTRODUCTION

1. The Report issued by the compliance Panel in the case *European Communities – Definitive*

European Union did not violate Article 2.4 by rejecting the Chinese producers' requests for

confidential information submitted by Pooja Forge regarding the list and characteristics of its products, China requests the Appellate Body to complete the analysis of China's claim under Article 6.5.1 for which the Panel did not make findings.

23. China requests the Appellate Body to find that the European Union violated Article 6.5.1 of the AD Agreement because it failed to ensure that Pooja Forge provides a non-confidential summary of the information regarding its products and/or failed to ensure that Pooja Forge establishes the existence of exceptional circumstances and provides a statement of reasons why, in such exceptional circumstances, summarization was not possible.

ANNEX B-3**EXECUTIVE SUMMARY OF CHINA'S APPELLEE'S SUBMISSION****1 INTRODUCTION**

1. In its Appellant Submission, the European Union appeals and requests the Appellate Body to reverse a number of findings and conclusions of the Panel. In the first place, the European Union takes issue with the scope of the Panel's jurisdiction and appeals the Panel's findings that China's claims under Articles 6.5, 6.4, 6.2, 6.1.2, 2.4, 4.1 and 3.1 of the AD Agreement fell within its terms of reference in accordance with Article 21.5 of the DSU. Furthermore, the European Union appeals the Panel's findings on the merits under Articles 6.5, 6.2, 6.4, 2.4, 2.4.2, 4.1 and 3.1 of the AD Agreement. China submits that all claims of the European Union are without merit and therefore requests the Appellate Body to reject the European Union's appeal in its entirety.

2 THE PANEL CORRECTLY FOUND THAT CHINA'S CLAIMS UNDER ARTICLES 6.5, 6.4, 6.2, 6.1.2, 2.4, 4.1 AND 3.1 OF THE AD AGREEMENT FELL WITHIN ITS TERMS OF REFERENCE

2. China submits that, contrary to the European Union's arguments, the Panel correctly found that China's claims under Articles 6.5, 6.4, 6.2, 6.1.2, 2.4, 4.1 and 3.1 of the AD Agreement were within its terms of reference. These findings are consistent with a correct interpretation and application of Article 21.5 of the DSU in light of the existing case-law of the Appellate Body. Furthermore, in reaching its conclusions the Panel acted in accordance with the requirements set out in Article 11 of the DSU.

2.1 China's claim under Article 6.5 of the AD Agreement

3. The Panel correctly found that China's claim under Article 6.5 fell within its terms of reference. All claims of error raised in this regard by the European Union must be rejected.

4. First, while the European Union essentially claims that the Panel erroneously assessed the facts in the original and compliance proceedings regarding the type of information that was the object of the claims, it has not raised Article 11 of the DSU and thus the Appellate Body should simply reject its claim.

5.

correctly concluded that China's claim goes to the very heart of a compliance panel's task under Article 21.5 of the DSU. Furthermore, contrary to the European Union's arguments, the Panel correctly concluded that the aspect at issue became an integral part of the measure taken to comply.

14.

AD Agreement by treating as confidential the information submitted by Pooja Forge regarding the list and characteristics of its products.

4 THE PANEL CORRECTLY FOUND THAT THE EUROPEAN UNION VIOLATED ARTICLES 6.4 AND 6.2 OF THE AD AGREEMENT BY FAILING TO PROVIDE THE CHINESE PRODUCERS WITH TIMELY OPPORTUNITIES TO SEE THE INFORMATION ON THE LIST AND CHARACTERISTICS OF POOJA FORGE'S PRODUCTS

21. China submits that the appeal brought by the European Union should be rejected by the Appellate Body because the Panel appropriately interpreted and applied Articles 6.4 and 6.2 of the AD Agreement to the facts of the case.

22. With respect to Article 6.4, and contrary to the European Union's contention, the Panel correctly found that all three conditions set out in this provision were met in the present case. First, the Panel correctly found that the information requested by the Chinese producers was relevant to the presentation of their cases. Indeed, the repeated requests made by the Chinese producers indicated why access to such information was relevant. Furthermore, the Panel correctly examined the type and nature of the information at issue and rightly concluded that such information concerned the determination of the normal values and ultimately the dumping margins for the Chinese producers. Second, the Panel correctly found that the information requested by the Chinese producers was not confidential as defined in Article 6.5. Third, the Panel correctly found

side. Such conclusion is also not supported by the possibility of sampling foreseen by Article 6.10 or the Panel's findings concerning the issue of timing of transactions in *US – Stainless Steel (Korea)*. Finally, the alleged representativeness of the export sales included in the comparison is irrelevant to the legal obligation under Article 2.4.2, i.e. to take into account all comparable export transactions for calculating dumping margin. In any event, the European Union's argument, illustrated by a chart, is factually incorrect.

36. Third, the European Union's characterization of its methodology as "neutral" is misleading. The European Union took into account only those Chinese producers' exports of fasteners for which there was a matching model sold by Pooja Forge. The other export transactions were simply ignored. As a result, the comparison made by the European Union resulted in a presumption of dumping for those export transactions that we

ANNEX B-4

EXECUTIVE SUMMARY OF THE EUROPEAN UNION'S APPELLEE'S SUBMISSION

1. In its Other Appellant Submission, China mischaracterises the Panel's findings and effectively tries to re-litigate the factual and evidentiary issues that were adequately addressed by the Panel in its findings.
2. In addition, and despite its repeated statements to the contrary, it is clear that China is in fact challenging the appropriate use of the analogue country methodology by the European Union. However, the Commission resorted to the prices of the Indian producer Pooja Forge to establish the normal value in line with China's Accession Protocol. China's claims as developed before the Panel and as repeated in its Other Appellant Submission, effectively take issue with the European Union's Non Market Economy (NME) methodology and seeks to change the normal value determination so as to have it reflect the Chinese producers' distorted market conditions. According to China, the prices of the Indian producer may be used as long as they are then changed to reflect conditions in the Chinese market and are adapted to the specifics of the Chinese producers on input costs, taxes, access to raw materials, etc. No matter how many times China states that it is not challenging the analogue country methodology and asserts that the Panel erred when viewing its claims for adjustments

ANNEX C

ARGUMENTS OF THE THIRD PARTICIPANTS

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ANNEX C-1

EXECUTIVE SUMMARY OF JAPAN'S THIRD PARTICIPANT'S SUBMISSION

A. The proper Treatment of Confidential Information

1.

ANNEX C-2

EXECUTIVE SUMMARY OF THE UNITED STATES' THIRD PARTICIPANT'S SUBMISSION

1. A basic tenet of the AD Agreement, as reflected in various Article 6 provisions, is that parties to an investigation must be given a full and fair opportunity to see relevant information and defend their interests. At the same time, protection of confidential information is essential to the appropriate functioning of an antidumping proceeding. Various aspects of those transparency and confidentiality requirements are being challenged before the Appellate Body.

2. The Appellate Body has affirmed the Panel's interpretation of Article 6.8 of the AD Agreement. The Appellate Body has also affirmed the Panel's interpretation of Article 6.8 of the AD Agreement.