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# CHINA – MEASURES IMPOSING ANTI-DUMPING DUTIES ON HIGH-PERFORMANCE STAINLESS STEEL SEAMLESS TUBES ("HP-SSST") FROM JAPAN

AB-2015-4

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

AB-2015-5

*Reports of the Appellate Body*

*Addendum*

This *Addendum* contains Annexes A to C to the Reports of the Appellate Body circulated as document WT/DS454/AB/R; WT/DS460/AB/R.

The Notices of Appeal and Other Appeal and the executive summaries of written submissions contained in this Addendum are attached as they were received from the participants and third participants. The content has not been revised or edited by the Appellate Body, except that paragraph and footnote numbers that did not start at one in the original may have been re-numbered to do so, and the text may have been formatted in order to adhere to WTO style. The executive summaries do not serve as substitutes for the submissions of the participants and third participants in the Appellate Body's examination of these appeals.

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# ANNEX A

## NOTICES OF APPEAL AND OTHER APPEAL

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## ANNEX A-1

### JAPAN'S NOTICE OF APPEAL*
### (DS454)

Pursuant to Article 16.4 and Article 17 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") and Rule 20 of the Working Procedures for Appellate Review ("Working Procedures"), Japan hereby notifies the Dispute Settlement Body of its decision to appeal to the Appellate Body certain issues of law covered in the Panel Report in *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan* (WT/DS454/R) ("Panel Report"), and certain legal interpretations developed by the Panel in this dispute.

For the reasons to be elaborated in its submissions and oral statements to the Appellate Body, Japan appeals the following errors in the issues of law in the Panel Report and legal interpretations developed by the Panel, and requests the Appellate Body to reverse and modify the related findings, conclusions and recommendations of the Panel, and where indicated to complete the analysis.[1]

1. With respect to Japan's claims that the price effects analysis conducted by the Ministry of Commerce of the People's Republic of China ("MOFCOM") is inconsistent with Articles 3.1 and 3.2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("Anti-Dumping Agreement"):

   a. The Panel erred in its interpretation and application of Articles 3.1 and 3.2 of the Anti-Dumping Agreement in concluding that an investigating authority may complete its analysis of the "effect of the dumped imports on prices" under Article 3.2 by simply finding price undercutting to exist solely based on the consideration of whether subject import prices are mathematically lower than prices of domestic like products, without consideration of whether, by selling at lower prices, subject imports have the effect of giving rise to an actual decrease or prevention of increase in prices in the domestic market for like products, or alternatively taking the place of domestic like products.[2] Japan requests the Appellate Body to reverse and modify the Panel's legal interpretation in this regard, and complete the analysis to find instead that MOFCOM acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement by concluding an analysis of the "effect of the dumped imports on prices" with a finding of price undercutting for Grade C solely based on a mathematical comparison of imported and domestic Grade C prices.[3]

   b. The Panel erred in interpreting Articles 3.1 and 3.2 of the Anti-Dumping Agreement to mean that it is sufficient under Article 3.2 for an investigating authority to find mathematicallysed on9003S th1 234.6forman

2. With respect to Japan's claims that MOFCOM's impact analysis is inconsistent with Articles 3.1 and 3.4 of the Anti-Dumping Agreement:

a. The Panel erred in its interpretation and application of Articles 3.1 and 3.4 of the Anti-Dumping Agreement in concluding that an investigating authority may find the required "consequent impact" by finding simply that "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", without any further consideration of the relationship between subject imports and the state of the domestic industry, or the explanatory force of subject imports on the state of the domestic industry, and the logical connection between the volume and price effects found to exist under the Article 3.2 analysis and the state of the domestic industry.[5] Japan requests the Appellate Body to reverse and modify the Panel's legal interpretation in this regard, and complete the analysis to find that MOFCOM acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement by failing to examine the relationship between subject imports and the state of the domestic industry, and by conducting an impact analysis that was at odds with and did not follow from its volume and price effects analyses.

b. The Panel erred in finding that Japan's claim that MOFCOM failed to examine whether subject imports provided explanatory force for the state of the domestic industry was outside the Panel's terms of reference.[6] Japan requests that the Appellate Body reverse the Panel's finding in this regard, and complete the analysis to find that MOFCOM acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumpi-23.3 -tocte(i)-the analor

## ANNEX A-2

### CHINA'S NOTICE OF APPEAL[*]
### (DS460)

1. Pursuant to Articles 16.4 and 17 of the DSU and Rule 20 of the Working Procedures, China hereby notifies the Dispute Settlement Body of its decision to appeal certain issues of law and legal interpretations developed in the Report of the Panel in *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union* (WT/DS460/R) (Panel Report).

2.

b. the Panel's findings and conclusions concerning the consistency of MOFCOM's conduct with Article 6.7 and Paragraph 7 of Annex I of the Anti-Dumping Agreement, as contained *inter alia* in paras. 7.98-7.101 and para. 8.6(c), including that "China acted inconsistently with Article 6.7 and Paragraph 7 of Annex I of the Anti-Dumping Agreement by rejecting SMST's request for rectification only on the basis that it was not provided prior to verification", because the Panel erred in its interpretation and application of Article 6.7 and Paragraph 7 of Annex I of the Anti-Dumping Agreement when reaching those findings and conclusions;

c. the Panel's findings and conclusions concerning the consistency of MOFCOM's reliance on the market share in the causation analysis with Articles 3.1 and 3.5 of the Anti-Dumping Agreement, as contained *inter alia* in paras. 6.106, 7.181-7.188, 7.205 and 8.6(d)(iii), including that "MOFCOM improperly relied on the market share of subject imports [...] in determining a causal link between subject imports and material injury to the domestic industry, contrary to Articles 3.1 and 3.5 of the Anti-Dumping Agreement", because of the following errors of law and legal interpretation:

   i. in reaching those findings and conclusions the Panel erred in considering that the European Union in its submissions "referred to the relevance of market share data in the context of price effects" and ruled on a matter that was not before it, contrary to Article 11 of the DSU, or in the alternative, made the case for the complainant and acted in violation of the principles governing the burden of proof, the due process requirements, Paragraph 7 of the Joint Working Procedures and Article 11 of the DSU;

   ii. the Panel erred in the interpretation and application of Articles 3.1 and 3.5 of the Anti-Dumping Agreement and acted contrary to Article 11 of the DSU when reaching those findings and conclusions, including when finding that MOFCOM's reliance on the market shares is not sufficient to establish that subject imports, through price undercutting, had a relatively big impact on the price of the domestic industry, and a consequent finding of causation consistent with Article 3.5 of the Anti-Dumping Agreement;

d. the Panel's findings and conclusions concerning the consistency of MOFCOM's non-attribution analysis with Articles 3.1 and 3.5 of the Anti-Dumping Agreement, as contained *inter alia* in paras. 7.200-7.205 and 8.6(d)(iv), including that "MOFCOM failed to ensure that injury caused by the decrease in apparent consumption and the increase in production capacity was not attributed to subject imports, contrary to Articles 3.1 and 3.5 of the Anti-Dumping Agreement", because these are entirely based on the Panel's findings and conclusions contained in paras. 6.106, 7.181-7.188, 7.205 and 8.6(d)(iii) (including the Panel's erroneous rejection of China's reliance on MOFCOM's price correlation finding) that have to be reversed for the reasons set out in subparagraph (c) above;

e. the Panel's findings and conclusions concerning the consistency of MOFCOM's treatment of confidential information with Article 6.5 of the Anti-Dumping Agreement, as contained *inter alia* in paras. 7.290, 7.297-7.303 and 8.6(e), including that "MOFCOM allowed certain information supplied by the petitioners to remain confidential without objectively assessing "good cause" or scrutinizing the petitioners' showing of "good cause", contrary

iii. the internally inconsistent reasoning as regards the consistency of the measure at issue with Article 6.5 and Article 6.5.1 cannot be reconciled with the Panel's duty to make an objective assessment of the facts under Article 11 of the DSU and the Panel disregarded Paragraph 7 of the Joint Working Procedures when reaching those findings and conclusions.

## ANNEX A-3

### CHINA'S NOTICE OF OTHER APPEAL[*]
### (DS454)

1. Pursuant to Articles 16.4 and 17 of the DSU and Rule 23 of the Working Procedures, China hereby notifies the Dispute Settlement Body of its decision to appeal certain issues of law and legal interpretations developed in the Report of the Panel in *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan* (WT/DS454/R) (Panel Report).

2. Pursuant to Rules 23(1) and 23(3) of the Working Procedures, China is simultaneously filing this Notice of Other Appeal and its Other Appellant Submission with the Appellate Body Secretariat.

3. The measure at issue in this dispute concerns anti-dumping duties imposed on imports of High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the Japan. The Ministry of

b. the Panel's findings and conclusions concerning the consistency of MOFCOM's non-attribution analysis with Articles 3.1 and 3.5 of the Anti-Dumping Agreement, as contained *inter alia* in paras. 7.200-7.205 and 8.1(a)(iv), including that "MOFCOM failed to ensure that injury caused by the decrease in apparent consumption and the increase in production capacity was not attributed to subject imports, contrary to Articles 3.1 and 3.5 of the Anti-Dumping Agreement", because these are entirely based on the Panel's findings and conclusions contained in paras. 6.106, 7.181-7.188, 7.205 and 8.1(a)(iii)

## ANNEX A-4

EUROPEAN UNION'S NOTICE OF OTHER APPEAL*
(DS460)

Pursuant to Article 16.4 and Article 17.1 of the *DSU*, the European Union hereby notifies to the Dispute Settlement Body its decision to appeal to the Appellate Body certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel in the dispute *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union (WT/DS460)* (AB-2015-5). Pursuant to Rule 23(1) of the *Working Procedures for Appellate Review*, the European Union simultaneously files this Notice of Appeal with the Appellate Body Secretariat.

For the reasons to be further elaborated in its submissions to the Appellate Body, the European Union appeals, and requests the Appellate Body to reverse, modify or declare moot and of no legal effect the findings, conclusions and recommendations of the Panel, with respect to the following errors of law and legal interpretations contained in the Panel Report, and where indicated to complete the analysis[1]:

### I. ADDITIONAL WORKING PROCEDURES ON BCI

1. The European Union appeals and seeks the reversal and/or modification of the Panel's legal findings and conclusions concerning the designation of Business Confidential Information (BCI).[2] The Panel erred in its interpretation and application of Articles 18.2 and 13.1 of the DSU and Articles 17.7 and 6.5 of the Anti-Dumping Agreement. The Panel erroneously found that information designated as confidential within the meaning of Article 6.5 of the Anti-Dumping Agreement is automatically confidential within the meaning of Article 17.7 of the Anti-Dumping Agreement and Article 18.2 of the DSU and may be automatically designated as BCI within the meaning of BCI Procedures. The European Union requests the Appellate Body to complete the analysis.

2. The European Union appeals and seeks the reversal and/or modification of the Panel's legal findings and conclusions concerning the provision of an authorizing letter.[3] The Panel erred in its interpretation and application of Articles 18.2 and 13.1 of the DSU and Articles 17.7 and 6.5 of the Anti-Dumping Agreement. The Panel erroneously found that information designated as confidential within the meaning of Article 6.5 of the Anti-Dumping Agreement is automatically confidential within the meaning of Article 17.7 of the Anti-Dumping Agreement and Article 18.2 of the DSU, and that it may only be disclosed within the meaning of Article 17.7 of the Anti-Dumping Agreement on the basis of a formal authorization from the person, body or authority providing such information to the investigating authority in the municipal anti-dumping proceeding. The European Union requests the Appellate Body to complete the analysis.

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* This document, dated 26 May 2015, was circulated to Members as document WT/DS460/8.

[1] Pursuant to Rule 20(2)(d)(iii) of the *Working Procedures for Appellate Review* this Notice of Appeal includes an indicative list of the paragraphs of the Panel Report containing the alleged errors, without prejudice to the ability of the European Union to refer to other paragraphs of the Panel Report in the context of its appeal.

[2] Panel Report, paras. 7.18-7.25, particularly paras. 7.21 ("… the phrase "confidential information" in Article 17.7 refers to the confidential 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.") and 7.25 ("… we have decided not to modify paragraph 1 of the BCI Procedures in the manner proposed by the European Union.").

[3] Panel Report, paras. 7.26-7.29, and para. 7.21, particularly the finding that ("… the phrase "confidential information" in Article 17.7 refers to the confidential 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.") and the interpretation of the phrase "person, body or authority".

## II. ARTICLE 6.2 OF THE DSU

3. The European Union appeals and seeks the reversal and/or modification of the Panel's legal findings and conclusions that, with respect to the European Union's claim under Article 2.2, the panel request did not comply with Article 6.2 of the DSU, because it allegedly did not "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly".[4] The Panel erred in its interpretation and application of Article 6.2 of the DSU. The European Union requests the Appellate Body to complete the analysis. However, if the Appellate Body upholds the Panel's findings concerning the European Union's claim under Article 2.2.2 of the Anti-Dumping Agreement[5], or completes the analysis by confirming that claim, then it need not consider this appeal point.

4. The European Union appeals and seeks the reversal and/or modification of the Panel's legal findings and conclusions that, with respect to the European Union's claim under Article 2.2.1.1, the panel request did not comply with Article 6.2 of the DSU, because it allegedly did not "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly".[6] The Panel erred in its interpretation and application of Article 6.2 of the DSU. The European Union requests the Appellate Body to complete the analysis. However, if the Appellate Body upholds the Panel's findings concerning the European Union's claim under Article 2.2.2 of the Anti-Dumping Agreement[7], or completes the analysis by confirming that claim, then it need not consider this appeal point.

## III. DUMPING

5. If the Appellate Body reverses the Panel's legal findings and conclusions to the effect that China acted inconsistently with Article 6.7 and Annex I, paragraph 7 of the Anti-Dumping Agreement[8], and does not complete the analysis by finding that China acted inconsistently with these provisions, then the European Union appeals the Panel's legal findings and conclusions with respect to Article 6.8 and Annex II, paragraphs 3 and 6.[9] The European Union requests the Appellate Body to reverse and/or modify these legal findings and conclusions. The Panel erred in its interpretation and application of Article 6.8 and Annex II, paragraphs 3 and 6. Investigating authorities are not permitted to disregard rectified data only because it is provided at verification,
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7. The European Union appeals the Panel's legal findings and conclusions concerning the interpretation and application of Article 3.1 and the second sentence of Article 3.2 of the Anti-Dumping Agreement, specifically with respect to the question of whether MOFCOM's findings of price undercutting in respect of Grades B and C were sufficient to comply with MOFCOM's obligation to consider whether or not the price of the dumped imports had a significant effect on the price of the domestic product.[11] The European Union submits that these legal findings and conclusions of the Panel are legally erroneous and requests that the Appellate Body reverse and/or modify them, and complete the analysis.

8. The European Union appeals the Panel's legal findings and conclusions concerning the interpretation and application of Articles 3.1 and Article 3.4 of the Anti-Dumping Agreement, specifically with respect to the assessment of the impact of the dumped imports on the domestic industry.[12] In effect, the Panel erroneously concluded that MOFCOM's failure to comply with the requirements of Article 3.2, as properly understood, and Article 3.5, had no implications for the consistency of the measure at issue with Article 3.4, and that, in this respect, there were no independent claims under Article 3.5. The European Union submits that these findings and conclusions of the Panel are legally erroneous and requests that the Appellate Body reverse and/or modify them, and complete the analysis.

9. The European Union appeals – pursuant to Article 11 of the DSU – certain of the Panel's legal findings and conclusions concerning Articles 3.1 and Article 3.5 of the Anti-Dumping Agreement, specifically with respect to the assessment of causation.[13] The European Union submits that, in this respect, the Panel failed to make an objective assessment of the matter before it, as required by Article 11 of the DSU. It wrongly concluded that the European Union had not made relevant independent claims under Article 3.5, and it failed to assess those claims and arguments. The European Union requests that the Appellate Body reverse and/or modify these legal findings and conclusions, and complete the analysis.

## V. PROCEDURAL ISSUES

10. The European Union appeals the Panel's legal findings and conclusions concerning the interpretation and application of Article 6.9 of the Anti-Dumping Agreement, specifically with respect to the obligation to adequately disclose essential facts – and particularly with respect to the data underlying MOFCOM's determination of dumping with respect to SMST and Tubacex.[14] The European Union submits that these legal findings and conclusions of the Panel are legally erroneous and requests that the Appellate Body reverse or modify them, and complete the analysis.

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[11] Panel Report, para. 8.7(b)(i), second phrase, para. 7.143, and paras. 7.136-7.142.
[12] Panel Report, para. 8.7(b)(ii), first phrase, paras. 7.152-7.155 and para. 7.170, penultimate sentence.
[13] Panel Report, para. 7.192, particularly the final sentence.
[14] Panel Report, para. 8.7(d)(i) and paras. 7.234-7.236, particularly para. 7.236.

# ANNEX B

## ARGUMENTS OF THE PARTICIPANTS

## ANNEX B-1

## III. JAPAN'S CLAIMS THAT MOFCOM'S IMPACT ANALYSIS IS INCONSISTENT WITH ARTICLES 3.1 AND 3.4 OF THE ANTI-DUMPING AGREEMENT

### A. The Panel erred in concluding that an investigating authority may find an impact under Articles 3.1 and 3.4 by simply finding the domestic industry in an injurious state and subject imports sold at prices that undercut certain domestic like products

6. Articles 3.1 and 3.4 require an investigating authority to examine the "consequent impact" of the dumped imports on the domestic industry through the "evaluation" of the various factors and indices specified in Article 3.4. Thus, an investigating authority must assess whether the observed changes in the state of the domestic industry are an effect or influence of the dumped imports. The Appellate Body has confirmed that an investigating authority must assess the relationship between subject imports and the state of the domestic industry, or the "explanatory force of subject imports for the state of the domestic industry", under Article 3.4.[3] Furthermore, as suggested by the word "consequent", there must be a logical connection between the results of the volume and price effects analyses under Article 3.2 and the impact analysis under Article 3.4.[4]

7. Japan requests that the Appellate Body reverse and modify the Panel's interpretation to make clear that Article 3.4 requires an assessment of the relationship between subject imports and the state of the domestic industry, or the "explanatory force", and a logical connection between the Article 3.2 volume and price effects inquiries and the Article 3.4 impact inquiry.

8. Here, MOFCOM should have focused its Article 3.4 assessment on those aspects of the domestic industry that could "logically" have been impacted by the volume and price effects it found under its Article 3.2 analysis. MOFCOM failed to do so. Japan therefore requests that the Appellate Body complete the analysis and find that MOFCOM's impact determination was inconsistent with Articles 3.1 and 3.4.

### B. The Panel erred in concluding that Japan's claim regarding MOFCOM's failure to examine whether subject imports had explanatory force for the state of the domestic industry was outside the Panel's terms of reference

9. The Panel also erred in finding Japan's claim regarding MOFCOM's failure to examine whether subject imports provided "explanatory force" for the state of the domestic industry under Articles 3.1 and 3.4 to be outside its terms of reference. The Panel explained that it failed to see a reference to this claim in Japan's Panel Request.[5] However, based on Japan's Panel Request read as a whole, as well as Japan's submissions and statements throughout the Panel proceedings, the Panel should have been able to recognize Japan's claim regarding "explanatory force", which is merely a different expression of the "consequent impact" or "the impact of subject imports on the domestic industry"[6] referred to in Japan's Panel Request. Moreover, there is no indication that China's ability to defend itself was prejudiced.

10. Therefore, Japan requests that the Appellate Body reverse the Panel's conclusion and find instead that this claim was within the Panel's terms of reference. Japan further requests that the Appellate Body complete the analysis and find that MOFCOM acted inconsistently with Articles 3.1 and 3.4 because it failed to examine whether subject imports provided "explanatory force" for the state of the domestic industry.

[3] Appellate Body Report, *China – GOES*, para. 149.
[4] Appellate Body Report, *China – GOES*, para. 128. *See also id.*, para. 143.
[5] Panel Report, para. 6.31 and note 274.
[6] *See* Appellate Body Report, *China – GOES*, para. 149.

domestic industry, or the explanatory force of subject imports on the state of the domestic industry, and the logical connection between the volume and price effects found to exist under the Article 3.2 analysis and the state of the domestic industry;

reverse the Panel's finding that Japan's claim that MOFCOM erred under Articles 3.1 and 3.4 of the Anti-Dumping Agreement because it failed to examine whether subject imports provided explanatory force for the state of the domestic industry was outside the Panel's terms of reference[10], and find instead that this claim was properly within the Panel's terms of reference;

complete the legal analysis and find that MOFCOM acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement by: (i) conducting an impact analysis that was at odds with and did not follow from its volume and price effects analyses under Article 3.2; and (ii) failing to examine whether subject imports provided explanatory force for the state of the domestic industry;

find that the Panel failed to make an objective assessment of the matter before it as required by Article 11 of the DSU by erroneously concluding that Japan has not advanced independent claims under Articles 3.1 and 3.5 of the Anti-Dumping Agreement in those instances where the Panel had rejected (or not evaluated) one of Japan's claims under

## ANNEX B-2

### EXECUTIVE SUMMARY OF CHINA'S APPELLANT'S SUBMISSION[1] (DS460)

1. China appeals certain findings and conclusions contained in the report of the Panel in *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union*

Anti-Dumping Agreement and violated Articles 11 and 12.7 of the DSU and Article 17.6(i) of the Anti-Dumping Agreement by reaching the conclusion that "by using SGA data based on the application of coefficients to data that had already been excluded for the purpose of constructing normal value", MOFCOM failed to base the SG&A amounts on "actual data pertaining to production and sales in the ordinary course of trade of the like product".

7. The Panel failed to set out and explain its assessment of how and why China allegedly violated the requirement to base the SG&A amount on data that is actual and/or the requirement to base the SG&A amount on data that pertain to production and sales in the ordinary course of trade, contrary to its duties under Articles 11 and 12.7 of the DSU.

8. Moreover, the Panel's interpretation of Article 2.2.2 as requiring an investigating authority not to base the SG&A amount on data that were not used for the determination of the cost of production amount is erroneous. The Panel's reasoning seems to be based on the premise that costs of production that are not used for the calculation of the cost of production in the normal value determination are necessarily not "actual" and/or do not pertain to "sales in the ordinary course of trade". This is, however, incorrect.

9. The Panel failed to engage in the required assessment to analyze whether the SG&A amount was based on data that was actual and whether it was based on data pertaining to production and sales in the ordinary course of trade. To the extent that the Appellate Body would consider that the Panel implicitly engaged in an assessment of this sort, China submits that this was carried out contrary to Article 11 of the DSU. China conTD-.001( P)8(2( o)4bn-6.4(n)-l8(u)4a)6(l)jed not 34lemtob

European Union made purely consequential[2]

29. The Panel rejects China's reliance on MOFCOM's finding of price correlation for a combination of four elements. However, the Panel erred in its interpretation and application of Articles 3.1 and 3.5 of the Anti-Dumping Agreement and violated Article 11 of the DSU in relation to each of these four elements that together led to its rejection of China's reliance on MOFCOM's finding of price correlation.

30.

36. Also, the Panel applied the wrong standard of review in coming to its position that, by examining the Petitioners' requests in order to determine whether MOFCOM complied with the obligations in Article 6.5 of the Anti-Dumping Agreement, this would amount to a *de novo* review. This would not have amounted to a *de novo* review, but merely an assessment as to whether the facts before MOFCOM could have reasonably supported its conclusion that "good cause" was shown and that the granting of confidential treatment was, accordingly, warranted.

37. The Panel's internally inconsistent reasoning as regards the consistency of the measure at issue with Article 6.5 and Article 6.5.1 "cannot be reconciled with the Panel's duty to make an objective assessment of the facts under Article 11 of the DSU".[9] Moreover, the Panel disregarded Paragraph 7 of the Joint Working Procedures.

[9] Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 894.

## ANNEX B-3

### EXECUTIVE SUMMARY OF CHINA'S OTHER APPELLANT'S SUBMISSION[1] (DS454)

1. China appeals certain findings and conclusions contained in the report of the Panel in *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan* (DS454). China takes issue with a number of errors of legal reasoning, interpretation and application of the provisions of the *Anti-Dumping Agreement* and the *DSU*, which led the Panel to erroneous findings and conclusions. For the reasons set out in China's submissions during the Panel proceeding and for the reasons laid down in this submission to the Appellate Body, China appeals, and requests the Appellate Body to reverse, the findings and conclusions of the Panel with respect to the errors of law and legal interpretations contained in the Panel Report.

2. In relation to the Panel's conclusion that China violated Articles 3.1 and 3.5 of the Anti-Dumping Agreement because MOFCOM improperly relied on the market share of subject imports in determining a link between subject imports and material injury to the domestic industry, China submits the following.

3. With respect to Articles 3.1 and 3.5, Japan claimed (in addition to its claims with respect to the non-attribution analysis) that MOFCOM's causation determination lacked any foundation in MOFCOM's analysis of the volume, price effects and impact of subject imports. The price effects analysis based claim and impact analysis based claim were purely consequential[2] claims based on the alleged violations of Articles 3.2 and 3.4.

4. When addressing the independent Article 3.5 claim with respect to volume, the Panel dismissed the claim as presented by Japan (that is, the alleged reliance on volume effects and/or the alleged disregard of the absence of such volume effects in MOFCOM's causation analysis) in unambiguous terms.[3] That should have been the end of the Panel's evaluation of MOFCOM's reliance on the market share of subject imports.

5. The Panel, however, continued on its own motion by finding a violation of Article 3.5 in relation to MOFCOM's findings concerning the impact of price effects on the domestic industry (which MOFCOM qualified *inter alia* by reference to the volume of imports found to be made at undercutting prices). However, as found by the Panel itself, the only claim raised by Japan in

16. By relieving the complainant from the necessity of establishing a *prima facie* case, the Panel erred in law.[6]

17. Turning to the substance of the Panel's findings (even if assuming the Panel was in a position to reach these findings, *quod non*), the Panel erred in its interpretation and application of Articles 3.1 and 3.5 of the Anti-Dumping Agreement and violated Article 11 of the DSU by concluding that China acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement because "MOFCOM's reference to the market shares held by subject imports is not sufficient to establish that subject imports, through price undercutting, had "a relatively big impact on the price of the domestic like products", and therefore caused injury to the domestic industry through their price effects".

18.

23. As regards the Panel's finding of violation of Article 6.5 of the Anti-Dumping Agreement, China submits that the Panel erred in its interpretation and application of Article 6.5 of the Anti-Dumping Agreement and acted contrary to Article 11 of the DSU and Article 17.6(i) of the Anti-Dumping Agreement. First, the Panel erred in law when interpreting Article 6.5 as requiring an investigating authority to explain its conclusions as regards it examination of the requests for confidential treatment and/or why it considers such confidential treatment is warranted.

24. 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

## ANNEX B-4

EXECUTIVE SUMMARY OF THE EUROPEAN UNION'S OTHER APPELLANT'S SUBMISSION (DS460)

### I. BCI

#### A. *Designation of BCI*

1. The EU appeals the Panel's findings on the designation of BCI. The question of designation should be subject to objective criteria established and applied by a WTO adjudicator. It cannot be delegated to any other entity or person. Whilst a WTO adjudicator may give close attention to the views of a Member, an investigating authority or a firm, and whilst what may have occurred during the domestic proceedings might provide a reasonable starting point, it cannot form the basis for an *absolute* rule. By providing otherwise in its BCI Procedures the Panel acted inconsistently with Articles 18.2 and 13.1 DSU and Article 17.7 ADA.

#### B. *Authorizing Letter*

2. The EU appeals the Panel's findings concerning the authorizing letter. The additional confidentiality obligation is triggered by a designation by the submitting Member. It is not triggered by a designation by any other entity or by a firm. The BCI Procedures in this case originally included a statement that a party must seek and provide evidence of prior written authorisation from the entity that submitted such information in the anti-dumping proceedings. The EU considers that such statements in BCI Procedures are WTO inconsistent. Although the Panel partially addressed the concern raised by the EU, in doing so it built upon and re-affirmed certain legally erroneous findings that it had already made regarding Articles 17.7 and 6.5 ADA.

### II. ARTICLE 6.2 DSU

#### A. *Article 2.2 ADA*

3. The EU conditionally appeals the Panel's finding that, with respect to Article 2.2, the panel request did not comply with Article 6.2 DSU. The Panel Report fails to take into account the introductory language of Article 2.2.2, which establishes a clear link between Article 2.2 and Article 2.2.2. It is clear from Article 2.2.2 that it concerns "the amounts for administrative, selling and general costs and for profits". This refers directly back to the phrase in Article 2.2 "a reasonable amount for administrative, selling and general costs and for profits." It is therefore clear that a measure at issue that would not comply with Article 2.2.2 would also not comply with Article 2.2, insofar as it refers to "a reasonable amount for administrative, selling and general costs and for profits." This is confirmed by the final sub-paragraph of Article 2.2.2. Evidently, "the amounts for administrative, selling and general costs and for profits" determined for the purposes of Article 2.2.2 must always be reasonable, as that term appears in both Article 2.2.2 and in Article 2.2.

#### B. *Article 2.2.1.1 ADA*

4. The EU conditionally appeals the Panel's finding that, with respect to Article 2.2.1.1 (and the language "reasonably reflect the costh o4rr1.t9/(b)7.97.1(s Tc.1 Tw[(Tc.1 Tw[( )]TJsd su)]TJRi8.0733 re 2.)-

D. Articles 3.1 and 3.5 ADA: Causation

17. The EU appeals – pursuant to Article 11 DSU – certain of the Panel's findings concerning Articles 3.1 and Article 3.5 ADA with respect to the assessment of causation.

18. Among its claims under Articles 3.1 and 3.5 ADA, the EU claimed that MOFCOM's causation determination did not involve an objective examination and was not based on positive evidence be

## ANNEX B-5

### EXECUTIVE SUMMARY OF CHINA'S APPELLEE'S SUBMISSION[1] (DS454, DS460)

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8. China disagrees with the European Union's allegations in its conditional appeal of the Panel's findings regarding the European Union's claims under Article 6.8 and Paragraphs 3 and 6 of Annex II of the Anti-Dumping Agreement. The European Union disagrees with the Panel's finding that there was no factual basis for and no evidence on the Panel record in support of the European Union's claim that MOFCOM relied on the allegedly erroneous and uncorrected data in making its determination. Whether or not there was evidence on the Panel record that MOFCOM relied on uncorrected and erroneous data when making its determination is a factual determination by the Panel. The European Union failed in this respect to make a claim under Article 11 of the DSU (in its notice of other appeal or in its other appellant's submission). Therefore, whether or not the Panel made an objective assessment of the facts before it is not properly raised on appeal by the European Union and, accordingly, falls outside the scope of appellate review.

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14. A mathematical difference between comparable prices is the inquiry explicitly provided for in view of assessing the "effect of the dumped imports on prices" referred to in Articles 3.1 and 3.2. The use of the wording "effect of the dumped imports on prices" thus does not suggest the presence of any other required consideration beyond the comparison between prices for price undercutting. This is because the inquiry into the effect that links the subject imports with the prices of the domestic like products consists precisely of such comparison.

15. Japan and the European Union consider that a situation in which the domestic price increased can be better described as "price overcutting" or "overpricing by domestic products". This is erroneous for several reasons, including the fact that if price A is higher than price B, this necessarily means that price B is lower than price A. These are simply two sides of the same coin, but still reveal the relationship between the two prices. It is exactly this relationship or link between the import prices and the domestic prices that, according to the Appellate Body, an investigating authority should inquiry into under Article 3.2.

16. Moreover, the interpretation proposed by Japan and the European Union thus renders meaningless the wording "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" as well as the use of the "otherwise". The interpretation no longer addresses two distinguishable situations but rather addresses one specific situation (depression/suppression) that can be present in several circumstances, without raising the need to list all of these circumstances.

17. Japan also contests the Panel's legal interpretation because it allegedly may be construed to mean that it is sufficient under Articles 3.1 and 3.2 for an investigating authority to find mathematically lower prices of subject imports at a single point in time during the POI. China fails to find any such construction by the Panel in the paragraphs referred to by Japan. The Panel did not make any findings about the length of the period during which price undercutting should be found, as Japan never made a claim in this respect.

18. China submits that the European Union's appeal concerning the Panel's findings leading it to conclude that MOFCOM did not act inconsistently with Articles 3.1 and 3.2 by allegedly having improperly extended its finding of price undercutting in respect of Grades B and C to the domestic like product as a whole should be rejected.

19.

to consider price undercutting on the basis of Grades A, B and C separately. China fails to see why this conclusion would be any different, simply because an investigating authority had first attempted to consider price undercutting for the domestic like product as a whole. China also recalls that the Panel's findings are clearly premised on the fact that the grade-by-grade comparison was the appropriate methodology to ensure price comparability.

23. Finally, the Panel's factual findings confirm that, even if assuming the European Union's interpretation would be upheld, there would be no violation by MOFCOM.

24. Japan incorrectly submits that the Panel erred in finding that its claim regarding the explanatory force was outside its terms of reference. Japan acknowledges that this claim is separate from the claim that MOFCOM's impact analysis was at odds with and did not follow from its volume and price effects analyses. However, it simultaneously contends that the logical connection with the results of its Article 3.2 volume and price effects analyses and the explanatory force are merely different expressions or explanations of the same concept. If the concepts are identical, China fails to see why Japan felt compelled to fault the Panel for failing to address this fourth independent claim.

25. Japan also appeals the Panel's findings under Articles 3.1 and 3.4 in relation to Japan's claim that MOFCOM's impact analysis was at odds with and did not follow from its volume and price effects analyses. Japan's appeal essentially consists of a reintroduction of its claim concerning the absence of any explanatory force. Indeed, the relevant part of Japan's other appellant submission refers abundantly to the notion of explanatory force. China submits that for this reason, Japan's appeal should fail.

26. In any event, the Panel's findings should be upheld. China considers that the obligation to derive an understanding of the impact of the dumped imports on the domestic industry must be distinguished from the obligation to determine that the dumped imports are causing injury. Moreover, in order to reach an affirmative causation determination under Article 3.5, dumped imports must not be found to be the only cause of injury, nor the predominant cause of injury. Rather, an investigating authority can only find a causal link if it duly demonstrates that the dumped imports are *a cause* of injury. Since the assessment under Article 3.4 will be used as a basis for the causation determination under Article 3.5, this necessarily implies that the Article 3.4 assessment must allow an investigating authority to derive an *understanding* about whether or not the dumped imports could be *a cause* of injury.

27. Article 3.4 thus does not require an investigating authority to determine that the injury found to exist under Article 3.4 is caused by the dumped imports, nor that such injury can be attributed exclusively to the dumped imports. Rather, Article 3.4 requires an examination that allows an investigating authority to find that there is injury and that dumped imports can be considered to have "explanatory force" for part of the injury found to exist. It is important to distinguish such "explanatory force" from a determination of causation. Indeed, the wording "explanatory force" suggests that the dumped imports should be able to "serve, or intended to serve, as an explanation". It does not imply that the dumped imports are determined to actually explain the (or part of the) injury. The latter determination is to be reached in Article 3.5.

28. In view of the above, the Panel's interpretation is entirely consistent with the requirement to engage in an assessment of the relationship between subject imports and the state of the domestic industry or the explanatory force of subject imports for the state of the domestic industry. There is no need for a premise that those grades/time periods for which no price effects were found were not impacted by subject imports.

into account its standard of review under Article 17.6(i) of the Anti-Dumping Agreement. By faulting the Panel for having adopted a two-step (or "bifurcated") approach, the European Union is essentially faulting the Panel for not having carried out a *de novo* review. The European Union further claims that only what is caused by the dumped imports is correctly characterised as injury within the meaning of footnote 9 of the Anti-Dumping Agreement. However, this disregards the wording of footnote 9 itself and ignores the reference to "injuries" caused by "other factors" in Article 3.5.

30. Both Japan and the European Union allege that the Panels failed to make an objective assessment of the matter before it, as required by Article 11 of the DSU, in finding that the complainants did not raise independent claims under article 3.5 (other than reliance on the market share and non-attribution analysis). In this respect, China submits, first, that the requests for the establishment of a panel do not contain any independent claims. Indeed, the wording "flawed" presupposes a finding that the analysis is found to be violating Articles 3.2 and 3.4 of the Anti-Dumping Agreement. Reading the panel requests as a whole, it is even clearer that the alleged flawed price effects and impact analyses refer to the alleged violations of Articles 3.2 and 3.4. Consequently, if the Panels would have found that the complainants did make independent claims, it should have found these to be outside its terms of reference.

31. Second, even if assuming that the panel requests would have contained independent claims, such claims must be made explicitly in the submissions to a panel. Japan and the European Union, however, failed to do so. Japan and the European Union's (other) appellant's submissions should have at least identified relevant statements in their submissions to the Panels, in which they would have clearly stated independent claims. Their failure to do so should be sufficient to deny their request to the reverse the Panels' findings.

32. There is nothing in Japan's or the European Union's (other) appeal to suggest that the Panels' assessment was inaccurate, let alone not objective. The complainants erroneously consider that *Philippines – Distilled Spirits*

36. The European Union takes issue with the BCI Procedures and certain legal interpretations and findings made by the Panel when examining the European Union's request that the Panels amend two aspects of such BCI Procedures. During the Panel proceedings, this was essentially an issue between the European Union and the Panel. This issue was, and still is, unrelated to the dispute between the European Union and China.

37. China notes that, in respect of its appeal on this issue, the European Union is not requesting that the Appellate Body make findings that would result in DSB rulings and recommendations with respect to China's anti-dumping measures imposed on imports of HP-SSST. Therefore, China considers it unnecessary for the Appellate Body to examine this issue, as such examination would not contribute to the prompt or satisfactory settlement of this matter or contribute to secure a positive solution to this dispute. China further notes that the BCI Procedures exclusively governed the Panels' proceedings, which have been concluded.

38. China considers that, pursuant to Article 1.2 and Appendix 2 of the DSU, Article 17.7 of the Anti-Dumping Agreement is the most relevant provision governing confidentiality in the context of panel proceedings concerning disputes under the Anti-Dumping Agreement. China considers that "confidential information" under Article 17.7 refers to information submitted as confidential pursuant to Article 6.5 of the Anti-Dumping Agreement in the context of the underlying anti-dumping proceedings. In China's view, as a matter of WTO law, regardless of whether or not this is confirmed in a panel's BCI Procedures, information submitted as confidential to an investigating authority should by definition be designated as confidential before a panel examining the underlying anti-dumping proceedings. Such information should not be disclosed without specific permission or formal authorization of the party having submitted it in the underlying anti-dumping proceedings.

## ANNEX B-6

EXECUTIVE SUMMARY OF JAPAN'S APPELLEE'S SUBMISSION
(DS454)

### I. INTRODUCTION

1. China claims that the Panel erred under the Anti-Dumping Agreement, DSU, and Joint Working Procedures by concluding that the Ministry of Commerce of the People's Republic of China ("MOFCOM") violated Articles 3.1 and 3.5 and Article 6.5 of the Anti-Dumping Agreement in imposing anti-dumping duties on imports of high-performance stainless steel seamless tubes ("HP-SSST") from Japan. For the reasons stated below, the Appellate Body should reject China's claims of error in their entirety.

### II. THE PANEL DID NOT ERR WHEN FINDING THAT MOFCOM ACTED INCONSISTENTLY WITH ARTICLES 3.1 AND 3.5 OF THE ANTI-DUMPING AGREEMENT IN ITS CAUSATION AND NON-ATTRIBUTION ANALYSES

2. First, China's arguments that Japan never raised, articulated, or made a *prima facie* case regarding the claim that MOFCOM's reliance on the market share of subject imports was insufficient in the context of its price effects findings to establish a causal link[1] are entirely without merit. To the contrary, Japan properly raised this claim in its Panel Request, particularly when Japan's Panel Request is considered "*as a whole*" and "*in the light of attendant circumstances*".[2] Specifically, Japan addressed the fundamental problem with MOFCOM's causation analysis that it assessed none of the "effects of dumping, as set forth in paragraph[] 2" as required under Article 3.5, i.e., the *dynamic* trends in the volume of subject imports and the prices of the domestic like products. Further, Japan properly articulated this claim and made a *prima facie* case regarding this claim throughout its submissions to the Panel, beginning with its first written submission.[3] China appears to improperly divide Japan's claim and arguments into pieces, isolating the "market share based causation claim" in the context of the price effects analysis from the rest of Japan's claim. Such an argument is rooted in China's own faulty understanding that this issue must be treated in total isolation from other issues arising under Article 3.5, and thus without merit. The Panel therefore acted appropriately in its analysis and concl8(r)4.5.3( )6.6(id co3

5. Turning to China's particular arguments, regarding the Panel's finding that MOFCOM failed to account for the fact that the market share of subject imports had dropped in its causation analysis[7], the mere recitation of facts in MOFCOM's final determination does not constitute the "reasoned and adequate" and "unbiased and objective" analysis that an investigating authority is obligated to conduct.[8] Further, regarding the Panel's dismissal of MOFCOM's finding of price correlation as a sufficient basis for demonstrating cross-grade price effects[9], the mere recitation by MOFCOM in its discussion pertaining to the product under consideration of petitioners' argument that "the price changes of the three [grades] are to a certain extent correlated with one another"[10] does not as a matter of inference, logic, and obviousness lead to the conclusion that MOFCOM sufficiently found cross-grade price effects to justify its causation determination. China's argument is also faulty as it conflates theoretical *physical* substitutability with the *actual* substitutability relevant for a price effects analysis.

6. Third, China makes a purely consequential argument regarding the Panel's non-attribution

## ANNEX B-7

EXECUTIVE SUMMARY OF THE EUROPEAN UNION'S APPELLEE'S SUBMISSION
(DS460)

### I. EU THIRD PARTICIPANT SUBMISSION IN DS454

1. This submission is also the second part of the EU's Third Participant Written Submission in the appeal proceedings in DS454.

### II. REQUEST CONCERNING CONFIDENTIAL TREATMENT OF CERTAIN INFORMATION

2. The EU respectfully requests the Appellate Body to draft the Appellate Body Report so as to avoid express reference to information designated

## IV. DUMPING

### A. *MOFCOM'S failure to take into account certain information provided during the verification*

6. The EU is not aware of any investigating authority in any jurisdiction that operates a general and absolute rule according to which no rectification or clarification can ever be provided at verification. Any such rule would have to operate even-handedly for all interested parties, including the domestic industry. It would also surely be inconsistent with the ADA, which sets out

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on China's arguments in this appeal, the Appellate Body would have no basis to reverse the Panel's finding that MOFCOM's non-attribution analysis was inconsistent with Articles 3.1 and 3.5 of the ADA due to the reasons described at paragraphs 7.202-7.203 of the Panel Report.

## VI. PROCEDURAL ISSUES: ARTICLE 6.5 OF THE ADA

There is no internal inconsistency in the Panel's treatment of claims under Articles 6.5 and 6.5.1. The EU notes the ruling of the Appellate Body in EC – Fasteners (China) that an investigating

# ANNEX C

## ARGUMENTS OF THE THIRD PARTICIPANTS

## ANNEX C-1

8. The Panel's views regarding the analysis of the impact by dumped imports on the domestic industry is inconsistent with Article 3.4. The text of Article 3.4 requires investigating authorities to examine the impact of subject imports on an industry, and not just the state of the industry. 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.

9. As to the arguments made by Japan and the EU under Article 3.5, China is incorrect in arguing that the Panel decided on a matter that had not been raised by the complainants. It is clear from the submissions that Japan and the EU both properly submitted these claims to the Panel.

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