



**FOLLOW-UP PAPER ON ENHANCING TRANSPARENCY AND STRENGTHENING DUE
PROCESS IN ANTI-DUMPING AND COUNTERVAILING PROCEEDINGS**

COMMUNICATION FROM CHINA

The following communication, dated 23 June 2017, is being circulated at the request of the Delegation of China.

1 BACKGROUND

The *Proposal on Trade Remedies* (TN/RL/GEN/185) submitted by China on 21 April 2017 was circulated among the Members on 24 April. As the proponent, China had the opportunity at both the small group meeting on 11 May and the informal open-ended meeting of Negotiating Group on Rules on 31 May to present in detail the proposal and the underlying considerations, including the importance and necessity of promoting negotiations on anti-dumping and countervailing rules under current circumstances, the aims and suggestions for the following steps, as well as an introduction to the five aspects identified by China for further discussion.

Transparency and due process in AD and CVD proceedings are vital for interested parties on both sides to effectively defend their rights and interests, and for investigating authorities to make fair and impartial determinations. Members share the common goal of enhancing transparency and due process.¹ As transparency and due process are among the important and "do-able" subjects that have received in-depth discussions in previous negotiations with a relatively high level of convergence and good groundwork, and have also attracted much interest of the Members, China hereby submits this proposal on enhancing transparency and strengthening due process. This paper has further clarified China's suggestions contained in the proposal TN/RL/GEN/185 on this subject, based mainly on the Chair's consolidated text of 2011 (TN/RL/W/254) with adjustments that, inter alia, address concerns raised by Members, particularly the developing Members, on the potential burden that may be caused to their investigating authorities. This paper is thus meant to serve as the basis for further discussion of and improvement on transparency and due process.²

2 TRANSPARENCY AND DUE PROCESS IN AD PROCEEDINGS

2.1 Petitioner's standing (ADA Article 5.4)

The addition of Article 5.4 in the Chair's consolidated text of 2011 (TN/RL/W/254) provides that "[f]or the purpose of this paragraph, the term 'domestic industry' shall be interpreted as referring to the domestic producers as a whole of the like product, subject to the application of Article 4.1(i) and 4.1(ii)." While Article 4.1 of ADA provides that "[t]he term 'domestic industry' shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic

¹ *Proposal on Trade Remedies* by China, TN/RL/GEN/185.

² China would note that many proposals on this subject have been submitted by Members before the Chair's AD text of 2011. After that, some proposals have been continuously submitted by Members such as FANS, Russian Federation and Japan, for example, TN/RL/W/257, TN/RL/W/259, TN/RL/W/262 and TN/RL/W/265. We believe that these proposals provide valuable reference for further discussions on this subject.

production of those products." The above mentioned addition explicitly clarifies that when evaluating the petitioner's standing according to Article 5.4, the basis for determining the proportion of the support for an application by the domestic industry should be '*the domestic producers as a whole of the like product*', rather than '*those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products*'. This addition is proposed to be accepted.

The existing footnote 14 under ADA Article 5.4 states that "*[M]embers are aware that in the territory of certain Members employees of domestic producers of the like product or representatives of those employees may make or support an application for an investigation*". It is noticed that according to some Members' regulations and practices, the representatives of employees of domestic producers, such as the labor unions, are entitled to applying for initiating an AD investigation, and the relevant investigating authority may also initiate an investigation on such application even when the domestic producers of the like product keep silent or even express opposition to the application. However, the key element of the standards for evaluating the petitioner's standing as stipulated in Article 5.4 is the collective output of domestic producers in support. Therefore, the footnote 14 needs to be further clarified that even if employees of domestic producers or representatives of those employees may make or support an application for an investigation, the collective output of domestic producers of the like product shall still satisfy the requirements as set forth in Article 5.4. Additionally, this footnote should be accordingly moved to a place that follows the description of petitioner's standing test for it to be consistent with this clarification.

2.2 Notice before initiation (ADA Article 5.5 and Article 6.1.3)

Article 5.5 in the Chair's text of 2011 (TN/RL/W/254) has provided clarifications on two points. Firstly, the time limit for notice before initiation is clearly specified as "*no later than 15 days before initiating an investigation*". Secondly, in addition to notification, the full text of the written application shall also be provided to the government of the exporting Member concerned. Since these clarifications have specified the notification obligations of the investigating authorities, guaranteed the right to know of the interested parties and reflected the practices of some Members, it is proposed that these amendments be accepted.³

2.3 Access to information (ADA Article 6.4, Article 6.5.1)

Article 6.4, Article 6.4*bis*, and Article 6.5.1 in the Chair's text of 2011 (TN/RL/W/254) have made some clarifications and improvements with regard to access to non-confidential information by interested parties and non-confidential summaries, such as prompt access to all non-confidential information and the obligation of investigating authorities to maintain non-confidential information file. As these clarifications and improvements have reflected the achievements of rounds of the negotiations among Members, incorporated the practice and up-to-date developments of many Members, and also reflected the spirit and principles of recent DSB rulings⁴, we propose to accept them in the interest of consolidating the achievements and exploring possible further improvements.⁵

2.4 Disclosure (ADA Article 6.9)

Article 6.9 in the Chair's text of 2011 (TN/RL/W/254) has clarified that disclosure of essential facts to all interested parties shall be made in the form of a written report, and specified that investigating authorities shall ensure sufficient time, i.e. 20 days, for interested parties to respond to the disclosure and shall address such responses in their final determination. Article 6.9*bis* has further specified the content, form as well as standards on disclosures to exporters or producers in

³ Considering that the notification delivered 15 days before initiation may cause extra burden to investigating authorities of some developing Members, China hereby proposes that the notification shall, by no means, be later than 7 days before initiation when they have genuine difficulties.

⁴ For example, see the requirements and disciplines described by the Appellate Body and Panel on the scope of public information, timely and sufficient access to the information and non-confidential summaries in *EC-Fasteners (China)* (WT/DS397).

⁵ It is noted that a proposal *Transparency in Anti-dumping and Countervailing Duty Proceedings: the Issue of Confidentiality* (TN/RL/W/262), submitted by Russian Federation in 2015, contains discussions on the types of confidential information, good cause and non-confidential summaries that would provide valuable basis for further explorations on this subject.

greater detail. In order to improve transparency in this area with the aim of providing clearer and more detailed guidance, we propose to adopt Article 6.9 and Article 6.9*bis* in the Chair's text of 2011 (TN/RL/W/254) as the basis for further discussion.⁶

3 TRANSPARENCY AND DUE PROCESS IN CVD PROCEEDING⁷

It is well known that the government of the exporting Member is a party responding to countervailing investigations, and is obliged to provide a large amount of detailed information on government and national economic policies related to the alleged subsidy programs. Therefore, a hair-trigger initiation of countervailing proceedings may result in substantial and even unconscionably heavy burden on the government of the exporting Member. China notes that in the current Article 11.2(iii) and Article 11.3 of the ASCM, the evidentiary standards for subsidy allegations are ambiguous and without clear instructions. China holds that the evidentiary standards should be further clarified in order to improve the initiation standards and practices of Members, increase transparency of the process and better protect the legitimate rights of exporting Members. The evidence laid out by petitioners for subsidy allegations must be sufficient to demonstrate such basic elements of the subsidy in question as financial contribution, specificity and benefits. And the investigating authorities shall proceed with the initiation of the proceedings only with accurate and adequate evidence, so as to satisfy the requirements of due process without adding to the burden on the respondent government or unnecessarily encouraging petitioners to make hearsay or unfounded subsidy allegations.

⁶ Since the 20-day requirement may cause extra burden to investigating authorities of some developing Members, China hereby proposes that they shall ensure at least 10 days for interested parties when they have genuine difficulties.

⁷ For discussion purposes, the draft legal language proposed in Section 2 of this document that improves on the current disciplines of Articles of the ADA may well be applied, with adjustment where appropriate, to the corresponding Articles of the ASCM. This will be further discussed in China's proposal to be submitted under the subject of transposition.

ANNEX 1**Proposed Amendments to ADA****Article 5***Initiation and Subsequent Investigation*

5.4 An investigation shall not be initiated pursuant to paragraph 1 unless the authorities have determined, on the basis of an examination of the degree of support for, or opposition to, the application expressed¹ by domestic producers of the like product, that the application has been made by or on behalf of the domestic industry.² The application shall be considered to have been made "by or on behalf of the domestic industry" if it is supported by those domestic producers whose collective output constitutes more than 50% of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application. However, no investigation shall be initiated when domestic producers expressly supporting the application account for less than 25% of total production of the like product produced by the domestic industry.³ For the purpose of this paragraph, the term "domestic industry" shall be interpreted as referring to the domestic producers as a whole of the like product, subject to the application of Article 4.1(i) and 4.1(ii).

¹ In the case of fragmented industries involving an exceptionally large number of producers, authorities may determine support and opposition by using statistically valid sampling techniques.

~~² Members are aware that in the territory of certain Members employees of domestic producers of the like product or representatives of those employees may make or support an application for an investigation under paragraph 1.~~

³ Members are aware that in the territory of certain Members employees of domestic producers of the like product or representatives of those employees may make or support an application for an investigation under paragraph 1. Under such circumstances, the collective output of domestic producers of the like product shall still satisfy the requirements in Article 5.4.

5.5 The authorities shall avoid, unless a decision has been made to initiate an investigation, any publicizing of the application for the initiation of an investigation. However, after receipt of a properly documented application and no later than 15 days¹ before initiating before proceeding to initiate an investigation, the authorities shall notify the government of the exporting Member concerned and shall provide it with the full text of the written application, paying due regard to the requirement for the protection of confidential information as provided for in paragraph 5 of Article 6.

¹ When investigating authorities of developing Members have genuine difficulties, this shall, by no means, be later than 7 days.

Article 6*Evidence*

- 6.1.3 As soon as an investigation has been initiated, the authorities shall provide the full text of the written application received under paragraph 1 of Article 5 to the known exporters¹ ~~and to the authorities of the exporting Member~~ and shall make it available, upon request, to other interested parties involved. Due regard shall be paid to the requirement for the protection of confidential information, as provided for in paragraph 5.

¹ It being understood that, where the number of exporters involved is particularly high, the full text of the written application ~~should~~ may instead be provided only to the authorities of the exporting Member or to the relevant trade association, if any. In such cases, the authorities shall so inform the government of the exporting Member.

6.4 The authorities shall ~~whenever practicable~~ provide ~~timely~~ opportunities for all interested parties to see promptly all information that is relevant to the presentation of their cases, that is ~~non-~~ confidential information as defined in paragraph 5, and that is used by submitted to or obtained by the authorities in an anti-dumping investigation, and to prepare presentations on the basis of this information.

6.4bisThe authorities shall maintain a file containing all non-confidential documents submitted to or obtained by the authorities in an anti-dumping proceeding, including non-confidential summaries of confidential documents and any explanations provided pursuant to Article 6.5.1 as to why summarization is not possible, and shall allow interested parties to review and copy the documents in that file upon request. Where the proceeding is ongoing or is subject to judicial, arbitral or administrative review, access to this file shall be provided within five working days of a request. The non-confidential file shall be kept in an organized manner, and a complete index of all documents in the possession of the authorities, including confidential documents, shall be included therein. Each file shall include all public notices related to that proceeding issued pursuant to Article 12, as well as separate reports issued pursuant to footnote 37 to that Article. Each file shall be maintained so long as the measure to which it relates remains in force. The authorities shall provide for the copying of documents in the non-confidential file at the reasonable expense of the person so requesting, or shall allow, subject to reasonable safeguards, that person to remove the documents for copying elsewhere.¹

¹ The requirements of this paragraph may be met by making such non-confidential documents and indices available via the internet.

- 6.5.1 The authorities shall require interested parties providing confidential information to furnish non-confidential versions of the document containing the confidential information within three working days of submitting the original document, summaries thereof. The non-confidential version shall be identical to the version containing the confidential information, except that the confidential information shall be removed and replaced by a summary of that information ~~These summaries shall be~~ in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. In exceptional circumstances, ~~such~~ parties providing confidential information may indicate that such information is not susceptible of summary. In such exceptional circumstances, a statement of the reasons why summarization is not possible must be provided.

6.9 The authorities shall, before a final determination is made, ~~inform~~provide all interested parties with a written report of the essential facts under consideration which they intend will form the basis for the decision whether to apply definitive measures. Interested parties shall have 20 days¹ to respond to this report and the authorities shall address such responses in their final determination.² ~~Such disclosure should take place in sufficient time for the parties to defend their interests.~~

¹ When investigating authorities of developing Members have genuine difficulties, this shall, by no means, be less than 10 days.

² Where no preliminary determination has been made, this disclosure shall be made within sufficient time to allow an exporter to offer an undertaking in response.

6.9bisThe authorities shall, normally within seven days after giving public notice of a final determination under Article 12.2, disclose to each exporter or producer for whom an individual rate of duty has been determined the calculations used to determine the margin of dumping for that exporter or producer.¹ The authorities shall provide to the exporter or producer the calculations, either in electronic format (such as a computer programme or spreadsheet) or in another appropriate medium, a detailed explanation of the information used, the sources of that information and any adjustments made to the information prior to its use in the calculations. The disclosure and explanation shall be in such a form as to permit the reproduction of the calculations.

¹ This requirement is satisfied where the authorities make such a disclosure pursuant to Article 6.9 before the final determination is made.

ANNEX 2

Proposed Amendments to ASCM

Article 11

Initiation and Subsequent Investigation

11.2 An application under paragraph 1 shall include sufficient evidence of the existence of (a) a subsidy and, if possible, its amount, (b) injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement, and (c) a causal link between the subsidized imports and the alleged injury. Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph. The application shall contain such information as is reasonably available to the applicant on the following:

- (iii) evidence with regard to the existence of elements including financial contribution, benefit and specificity ~~existence, amount and nature~~ of the subsidy in question;
