

CHINA – ANTI-DUMPING MEASURES ON STAINLESS STEEL PRODUCTS FROM JAPAN

(DS601)

**RESPONSES OF THE UNITED STATES OF AMERICA TO QUESTIONS
FROM THE PANEL TO THIRD PARTIES**

July 19, 2022

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<i>EC – Tube or Pipe Fittings (AB)</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil</i> , WT/DS219/AB/R, adopted 18 August 2003
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<i>Thailand – H-Beams (Panel)</i>	Panel Report, <i>Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland</i> , WT/DS122/R, adopted 5 April 2001, as modified by Appellate Body Report WT/DS122/AB/R
<i>US – Hot-Rolled Steel (AB)</i>	Appellate Body Report, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , WT/DS184/AB/R, adopted 23 August 2001

1 Question 1. In paragraph 36 of its third-party submission, the United States contends that "[e]ven if MOFCOM's definition were to meet the "major proportion" of domestic production standard of Article 4.1 of the Anti-Dumping Agreement, the Panel should assess whether MOFCOM's definition of the domestic industry was biased or designed to favour the interest of any group of interested parties in the investigation, inconsistent with Article 3.1 of the AD Agreement.

- a. **To the United States.** Is it the United States' view that a domestic industry that is defined consistently with Article 4.1 of the Anti-Dumping Agreement may nonetheless be inconsistent with Article 3.1 of the Anti-Dumping Agreement? In other words, is the United States of the view that Article 3.1 of the Anti-dumping Agreement imposes obligations on an investigating authority's definition of the domestic industry? Please explain your answer including, in particular, with reference to the text of Article 3.1.
- b. **Other third parties.** Please clarify whether it is your view that a domestic industry defined consistently with Article 4.1 of the Anti-Dumping Agreement may nonetheless be inconsistent with Article 3.1 of the Anti-Dumping Agreement. Please explain your answer including, in particular, with reference to the text of Article 3.1.

U.S. Response to Question 1:

1. Article 3.1 of the AD Agreement sets forth two overarching obligations. The first obligation is that the injury determination must be based on "positive evidence."¹ The second obligation is that the injury determination must involve an "objective examination" of the volume of the dumped imports, their price effects, and their impact on the domestic industry.² Article 3.1 states that:

A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.

2. By its terms, Article 3.1 indicates that these obligations extend to every aspect of an investigating authority's injury analysis.³ Article 3.1 thus requires an investigating authority to ensure that any material injury determination be based on "positive evidence" and involve an "objective examination" – including with respect to assessing the impact on domestic producers.

¹ Anti-Dumping Agreement, Art. 3.1; see *Mexico – Anti-Dumping Measures on Rice (AB)*, paras. 163-164.

² Anti-Dumping Agreement, Art. 3.1; see *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 180.

³ See *Thailand – H-Beams (AB)*, para. 106; *China – GOES (AB)*, paras. 130 and 201; *US – Hot Rolled Steel (AB)*, para. 193.

3. The term “positive evidence” relates to affirmative evidence tending to support a determination by the investigating authority, in contrast to mere conjecture or assertion.⁴ The term “objective examination” relates to the assessment of that positive evidence and suggests that the inquiry is to be conducted in an unbiased manner, without favoring the interests of any particular party in the investigation.⁵

4. To assess the impact on domestic producers, an investigating authority must take into account which domestic producers it refers to in its definition of the term “domestic industry” under Article 4.1 of the AD Agreement⁶ – and must do so on the basis of positive evidence and through an objective examination. As the United States explained in its third-party submission, there generally is an inverse relationship between the proportion of producers included in the domestic industry and the risk of material distortion in the definition of the domestic industry and in the assessment of injury.⁷ Accordingly, how an authority chooses to define the domestic industry in a given investigation has repercussions throughout the course of its injury analysis and determination; a flawed definition of the domestic industry can distort an authority’s material injury analysis.⁸ Where such authority defines the domestic industry to constitute a “major proportion” of total domestic production, the overarching obligations of Article 3.1 require it to ensure that it does so in an unbiased manner.

Question 2. In paragraphs 269, 281 and 288 of its first written submission, Japan contends that MOFCOM's determination that cumulation was appropriate did not foreclose the possibility that the alleged injury to the domestic industry was being caused only by the subject imports other than those originating from Japan. In assessing whether cumulation is appropriate under Article 3.3, is an investigating authority required to foreclose the possibility that the alleged injury to the domestic industry was being caused only by subject imports from some sources under investigation, and not other sources under investigation[?]

U.S. Response to Question 2:

5. The plain text of Article 3.3 of the AD Agreement indicates that an investigating authority may cumulate imports if, first, the dumping margins for the individual countries are more than *de minimis*, and second, the volume of imports from the individual countries are not negligible. In addition, the investigating authority must determine that a cumulative assessment is appropriate in light of the conditions of competition both between the imported products and between the imported products and the like domestic product. These are the only specified

⁴ See Oxford English Dictionary, “positive” (second definition: “Consisting in, characterized by, or expressing the presence or possession of a feature or quality, rather than its absence; of an affirmative nature.”) (available at oed.com). See, e.g., *China – GOES (AB)*, para. 126, citing *US – Hot-Rolled Steel (AB)*, para. 192.

⁵ See Oxford English Dictionary, “objective” (eighth definition: “Of a person or his or her judgement: not influenced by personal feelings or opinions in considering and representing facts; impartial, detached.”) (available at oed.com). See, e.g., *China – GOES (AB)*, para. 126, citing *US – Hot-Rolled Steel (AB)*, para. 193.

⁶ For example, Article 3.4 expressly refers to obligations with respect to the “examination of the impact . . . on the domestic industry” as part of the investigating authority’s determination of injury.

⁷ United States’ third-party submission, para. 35. Of course, a low proportion of producers might be permitted for a fragmented industry “provided that the process with which the {investigating authority} defined the industry did not give rise to a material risk of distortion.” See *EC – Fasteners (AB)*, para. 430.

⁸ See, e.g., *EC – Fasteners (AB)*, paras. 426-427.

textual prerequisites for cumulation, and there is no basis to impose other, unmentioned prerequisites, such as the proposed requirement to foreclose the possibility that the alleged injury to the domestic industry was being caused only by subject imports from some of the sources under investigation.⁹

6. The reasoning in prior reports similarly reflects that there is no basis in the text of Article 3.3 to impose a country-specific analysis of the potential negative effects of volumes and prices of dumped imports as a pre-condition for a cumulative assessment of the effects of all dumped imports.¹⁰

Question 3. In paragraph 184 of its first written submission, China contends that the obligation to ensure price comparability in the injury context is triggered only if, *inter alia*, the investigation covers various product types, which have price differences between them that are significant.

- a. **Please explain whether Articles 3.2 or 3.1 support the view that the obligation to ensure price comparability in the injury context arises only if price differences between various product types are "significant". If yes, why? If no, why not?**
- b. **If yes, how should an investigating authority distinguish between a price difference that is significant, and one that is not significant? Does anything in the text Anti-Dumping Agreement provide any guidance on how an investigating authority must make this distinction?**

U.S. Response to Question 3:

7. Article 3.2 of the AD Agreement states that:

With regard to the effect of the dumped imports on prices, the investigating authorities shall consider 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, or whether the effect of such imports is to depress prices to a significant degree or prevent prices increases, which otherwise would have occurred, to a significant degree.

8. The text of Article 3.2 does not require an investigating authority to use any particular type of price undercutting analysis.¹¹ Nor does it address price comparability, let alone adjustments for “significant” price differences. Investigating authorities thus have discretion to establish their own price undercutting analytical methodologies. However, the discretion afforded to investigating authorities is not unbounded. Rather, the analytical methodology an

⁹ In the United States’ view, analyzing the impact of subject imports before considering whether to cumulate under Article 3.3 would turn the agreement on its head, insofar as Article 3.3 contemplates that investigating authorities may cumulatively assess the effects of aggregate imports from sources under investigation. Article 3.3 explicitly establishes a test applied before investigating authorities may cumulatively assess the effects of aggregate imports from sources under investigation. In other words, the investigating authorities must first determine whether cumulation is appropriate before they can consider the effects of those cumulated imports.

¹⁰ See, e.g., *EC – Tube or Pipe Fittings (AB)*, para. 110.

¹¹ See *EC – DRAMS*, paras. 7.331-7.336; *EC – Tube or Pipe Fittings*, para. 7.277.

authority uses must conform with the “positive evidence” and “objective examination” standards specified in Article 3.1.¹²

9. In the United States’ view, to conduct a price effects analysis consistent with the objectivity and positive evidence requirements, an investigating authority must utilize domestic and subject import pricing data that permit reasonably accurate price comparisons. Such price comparisons must take into account, *inter alia*, the levels of trade at which domestic products and subject imports are sold and any differences in product mix.¹³

Question 4. At paragraph 118 of its first written submission, China argues that because MOFCOM's findings on price effects were based on the best information available and because Japan has not presented claims under Article 6.8 and Annex II of the Anti-Dumping Agreement, Japan's claims ought to be dismissed.

Please comment on whether the resort to best information available by an investigating authority for a particular aspect of its determination *ipso facto* precludes a challenge to that aspect of the determination under a provision of the Anti-Dumping Agreement other than Article 6.8 and Annex II thereof?

U.S. Response to Question 4:

10. MOFCOM’s resort to facts available with respect to one aspect of its price effects analysis does not require Japan to raise a claim under Article 6.8 of the AD Agreement or preclude claims under other provisions of the AD Agreement.

11. Article 6.8, as informed by the guidance in Annex II, permits an investigating authority, to fill in gaps with available facts when “any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation.”

12. In its final determination, MOFCOM notes that certain information was missing because companies from the European Union and Indonesia did not submit questionnaire responses.¹⁴ To replace the missing information, MOFCOM relied on China Customs data as the best information available to replace the missing questionnaire information.¹⁵ However, Japan is not challenging China’s use of Customs data for the missing questionnaire information and it is possible that MOFCOM’s use of China Customs data to replace the missing questionnaire information is consistent with Article 6.8.

13. As explained in its first written submission, Japan is challenging MOFCOM’s failure to ensure price comparability by not taking into account the significant differences among the three products that make up the subject imports.¹⁶ In other words, Japan is not challenging the prices used for the products, but rather the comparability of the products used, which are findings that

¹² *Thailand – H-Beams (AB)*, para. 106.

¹³ *China – Broiler Products*, paras. 7.480-7.483.

¹⁴ Final Determination, (Exhibit JPN-5.b), pp. 37.

¹⁵ Final Determination, (Exhibit JPN-5.b), pp. 37.

¹⁶ Japan FWS, para 74.

did not rely on facts available and are properly challenged under Articles 3.1 and 3.2 of the AD Agreement.

Question 5. In the third-parties' view, in examining the conditions of competition between the imported products, and between the imported and like domestic products, should an investigating authority find cumulation to be appropriate only where imports from different sources under investigation are substitutable?

U.S. Response to Question 5:

14. As the United States indicated above in its response to question 2, one of the prerequisites in Article 3.3 of the AD Agreement to cumulate imports is that an investigating authority must determine that such an assessment is “appropriate in light of the conditions of competition.”

15. Article 3.3 does not identify any specific conditions of competition that must exist for an appropriateness determination to be warranted. Rather, the conditions of competition guide the assessment of the investigating authority as to whether cumulation is “appropriate”. That assessment is, under the applicable standard of review, reviewed to determine whether an unbiased and objective investigating authority could have reached it. The general language in Article 3.3 thus reflects that “an investigating authority enjoys a certain degree of discretion in making that determination on the basis of the record before it”.¹⁷

16. Thus, it is incorrect that an investigating authority may “only” find cumulation to be appropriate where imports from different sources under investigation are substitutable. Nothing in Article 3.3 requires or suggests that this specific condition of competition be present for an appropriateness determination to be justified in a given case. Indeed, Article 3.3 is written in such a way precisely so as not to prejudge the circumstances that would warrant cumulation in each investigation. As the panel in *EC – Tube or Pipe Fittings* explained, there is “an element of flexibility” in making the appropriate determination, “in that there are no predetermined rigid factors, indices, levels or requirements.”¹⁸

Question 6. Imagine a scenario where the product under consideration (as well as the domestic like product) comprises two models that are not substitutable with each other (Model A and Model B). Model A is exported by one source under investigation, whereas Model B is exported by another source under investigation. The domestic industry produces both Model A and Model B.

Does Article 3.3 of the Anti-Dumping Agreement permit an investigating authority to cumulate imports from the two sources under investigation in this case?

U.S. Response to Question 6:

17. Before an investigating authority determines whether to exercise its discretion to cumulate imports, it must first define the domestic product or products like the imported products identified in an application. On that basis, the investigating authority then proceeds to

¹⁷ *EC – Tube or Pipe Fittings*, para. 7.240.

¹⁸ *EC – Tube or Pipe Fittings*, para. 7.240.

define the domestic industry or industries to conduct its injury analyses and make its determination regarding those industry(ies).

18. There are no additional substantive provisions to those set out in Article 2.6 relating to the definition of the “like product” in a particular investigation. Accordingly, an investigating authority must determine which domestic product is “alike in all respects, or . . . has characteristics closely resembling those of the product under consideration.” The determination of the investigating authorities regarding the “like product” must be based on positive evidence and an objective examination of the relevant facts; in those circumstances, the determination is consistent with the AD Agreement.¹⁹

19. The hypothetical posed by the Panel appears to presume that the investigating authority determined that there was a single domestic like product consisting of both Model A and Model B, and one domestic industry producing both models. In that case, the authority could cumulate subject imports from all sources so long as the requirements of Article 3.3 were met.²⁰

20. As the United States indicated above in its response to question 2, an investigating authority may cumulate imports under Article 3.3 of the AD Agreement only if, first, the dumping margins for the individual countries are more than *de minimis*, and second, the volume of imports from the individual countries are not negligible. In addition, the investigating authority must determine that a cumulative assessment is appropriate “in light of the conditions of competition both between the imported products and between the imported products and the like domestic product.”²¹

21. The “conditions of competition” within the meaning of Article 3.3 are determined by the investigating authorities, undertaking an examination that is objective and based on positive evidence. Depending on the facts, an investigating authority could find that subject imports from different sources compete despite a lack of interchangeability among them.

Question 7. China takes the view that a determination such as the product scope that is not subject to substantive obligations under the Anti-Dumping Agreement is also not subject to substantive obligations under Article 6.9 of the Anti-Dumping Agreement.²²

Please explain the basis of Japan's disagreement with this view.

¹⁹ See Article 3.1 of the Anti-Dumping Agreement (“A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.”) and Article 17.6 (“the panel shall determine whether the authorities’ establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective.”). See also *Korea – Certain Paper*, para. 7.219-7.220.

²⁰ Had the authority determined that there were two separate domestic like products—one consisting of Model A and the other of Model B—it would not be consistent with Article 3.3 to cumulate imports of Model A with imports of Model B.

²¹ Article 3.3 of the Anti-Dumping Agreement.

²² China's first written submission, para. 759.

U.S. Response to Question 7:

22. This question appears to be addressed to Japan.