CHINA – ANTI-DUMPING MEASURES ON IMPORTS OF CELLULOSE PULP FROM CANADA

(DS483)

THIRD PARTY EXECUTIVE SUMMARY OF THE UNITED STATES OF AMERICA

June 7, 2016

Executive Summary of U.S. Third Party Written Submission

I. Canada's Claims Regarding Price Effects under Articles 3.1 and 3.2 of the AD Agreement

1. The United States agrees with Canada and China that the obligations of Article 3.2 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "AD Agreement") must be considered in conjunction with the overarching principles of Article 3.1 of that Agreement.

2. Article 3.1 of the AD Agreement sets forth two overarching obligations that apply to multiple aspects of an authority's injury determination. The first overarching obligation is that the injury determination be based on "positive evidence." The Appellate Body has endorsed a description of "positive evidence" as "evidence that is relevant and pertinent with respect to the issue being decided, and that has the characteristics of being inherently reliable and trustworthy." The second obligation is that the injury determination involves an "objective examination" of the volume of the dumped imports, their price effects, and their impact on the domestic industry. The Appellate Body has stated that, to be "objective," an injury analysis must be "based on data which provides an accurate and unbiased picture of what it is that one is examining" and be conducted "without favouring the interests of any interested party, or group of interested parties, in the investigation." The plain text of Article 3.1 makes clear that these obligations extend to an authority's price effects analysis.

3. Article 3.2 of the AD Agreement outlines the examination that authorities must conduct to determine the price effects of dumped imports on the domestic market. The text contemplates three inquiries with regard to the effects of dumped imports on prices: price undercutting, price depression and price suppression.

4. The United States observes that Article 3.2 requires that an authority "consider" the volume and price effects of the relevant imports. The United States recalls that the Appellate Body in *China – GOES* found that Article 3.2 does not require an authority "to make a *definitive determination*" on price effects, recognizing the distinction between use of the verb "consider" in Article 3.2 of the AD Agreement and the verb "demonstrate" in Article 3.5. However, the fact that no definitive determination is required "does not diminish the scope of *what* the investigating authority is required to consider." The Appellate Body has explained that the inquiry must provide the authority with a "meaningful understanding of whether subject imports have explanatory force" for price depression or suppression, and, as required by Article 3.1, that understanding must be based on positive evidence and an objective examination.

5. In assessing price depression or suppression, the authority may not confine its consideration to an analysis of domestic prices. Rather, the plain text of Article 3.2 envisions an inquiry into the relationship between subject imports and domestic prices. Article 3.2 introduces the obligations on price effects by clarifying that the nature of the inquiry is to understand the "effect of the dumped imports on prices." An authority's analysis of the three delineated price effects – price undercutting, price depression, and price suppression – must necessarily be in reference to the dumped imports. The Appellate Body has endorsed this interpretation that it is not enough for an authority to simply observe what is happening to domestic prices.

6. Although the United States does not address the factual underpinnings of MOFCOM's cellulose pulp injury determination, the United States recalls that prior panels and the Appellate Body have considered the analysis by investigating authorities under Articles 3.1 and 3.2 of pricing parallels between subject imports and domestic like products, and of overselling by subject imports. The Appellate Body in *China – GOES* explained that Article 3.2 requires an investigating authority in its final determination to provide sufficient reasoning as to what explanatory force parallel pricing trends have for the depression or suppression of domestic prices.

7. As China has observed, the AD Agreement does not prescribe a particular methodology to be used in an investigating authority's price effects analysis. Nevertheless, Article 3.2 does set certain parameters for how the analysis is to be performed, as elaborated above. Based on these parameters, the Panel must evaluate whether the investigating authority provided a reasoned and adequate explanation as to how the evidence on the record supported its factual findings, and how those factual findings supported the overall determination of price depression.

II. Canada's Claims Regarding Articles 3.1 and 3.4 of the AD Agreement

8. Any determinations or findings made in connection with Article 3.4 must be based on "positive evidence" and "involve an objective examination," as required by Article 3.1 of the AD Agreement.

9. Article 3.4 of the AD Agreement sets out an authority's obligation to ascertain the impact of dumped imports on the domestic industry. The United States observes that Article 3.4 imposes an obligation on the authority to conduct an "examination" of the impact of the dumped imports on the domestic industry. And the text of Article 3.4 expressly requires investigating authorities to examine the "impact" of subject imports on a domestic industry, and not just the state of the industry.

10. As recognized by Articles 3.1 and 3.2 of the AD Agreement, subject imports can influence a domestic industry's performance through volume and price effects. Thus, to examine the impact of subject imports on a domestic industry, an authority would need to consider the relationship between subject imports – including subject import price undercutting, and the price depressing or suppressing effects of subject imports – and the domestic industry's performance during the period of investigation.

11. This interpretation is supported by the Appellate Body's observations in *China – GOES*:

> Articles 3.4 and 15.4…do not merely require an examination of the state of the domestic industry, but contemplate that an investigating authority must derive an understanding of *the impact of* subject imports on the basis of such an examination. Consequently, Articles 3.4 and 15.4 are concerned with the relationship between subject imports and the state of the domestic industry, and this relationship is analytically akin to the type of link contemplated by the term "the effect of" under Articles 3.2 and 15.2.

12. Thus, as both Canada and China observe, in examining "the relationship between subject imports and the state of the domestic industry" pursuant to Article 3.4 of the AD Agreement, an 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. The "examination" contemplated by Article 3.4 must be based on a "thorough evaluation of the state of the industry" and it must "contain a persuasive explanation as to how the evaluation of relevant factors led to the determination of injury."

13. Article 3.4 does not dictate the methodology that should be employed by the authority, or the manner in which the results of this evaluation are to be set out. However, the United States observes that the Panel must be able to discern that the authority's examination of the impact on the domestic industry – an examination that necessarily includes an evaluation of relevant economic factors – is based on positive evidence and an objective examination.

III. Canada's Claims Regarding Articles 3.1 and 3.5 of the AD Agreement

14. As with Articles 3.2 and 3.4 of the AD Agreement, the Appellate Body has recognized that it is appropriate to read the obligations of Article 3.5 in conjunction with Article 3.1 of the AD Agreement. That is, any determinations or findings made in connection with Article 3.5 must be based on "positive evidence" and "involve an objective examination," as required by Article 3.1 of the AD Agreement.

15. As Canada observes, Article 3.5 of the AD Agreement involves a two-part analysis: (1) an authority's demonstration that dumped imports are causing injury to the domestic industry ("causation"); and (2) an authority's examination of known factors other than dumped imports that could be the cause of injury to the domestic industry ("non-attribution").

16. The United States does not take a position on Canada's claims that MOFCOM's findings on volume and price depression are inconsistent with Article 3.2 of the AD Agreement. With respect to the interpretation of Articles 3.2 and 3.5, however, the United States agrees with Canada's argument that a deficient volume or price effects analysis could compromise a causation analysis where the findings on volume or price effects serve as a key element of the causation analysis. As the Appellate Body explained in *China – GOES*, the provisions in Article 3 "contemplate a logical progression in an authority's examination leading to the ultimate injury and causation determination." Fatal deficiencies in a volume or price effects analysis could compromise the objective nature of the causation analysis.

17. The first sentence of Article 3.5 sets out the general requirement for a demonstration that dumped imports are causing injury under the AD Agreement, and contains an explicit link back to Articles 3.2 (volume and price effects) and 3.4 (impact on domestic industries). If the volume or price effects findings are found to be inconsistent with Articles 3.1 and 3.2, or the impact findings are found to be inconsistent with Articles 3.1 and 3.4, an Article 3.5 causal link analysis relying on such findings would fail. That is, if an authority relies on a volume or price effects finding to support its impact and injury determinations, its decision must be supported by positive evidence on these counts. In such circumstances, a failure to demonstrate volume or price effects or significant impact would constitute a failure to demonstrate that dumped imports are causing injury, as required by the first sentence of Article 3.5 of the AD Agreement.

18. As the panel in *China – Autos (US)* explained "it would be difficult, if not impossible, to make a determination of causation consistent with the requirements of Articles 3 and 15 of the Anti-Dumping and SCM Agreements, respectively, in a situation where an important element of that determination, the underlying price effects analysis, is itself inconsistent with the provisions of those Agreements." The panel properly recognized that a final injury determination is the product of multiple intermediate determinations, each of which must be supported by positive evidence and an objective examination.

19. The third sentence of Article 3.5 of the AD Agreement provides that, in addition to examining the effects of the dumped imports, an authority must examine other known factors which at the same time are injuring the domestic industry. As the Appellate Body has found, if a known factor other than dumped imports is a cause of injury, the third sentence of Article 3.5 requires the authority to engage in a non-attribution analysis to ensure that the effects of that other factor are not attributed to the dumped imports. If there are no known factors other than the dumped imports that are injuring the domestic industry, Article 3.5 does not require an authority to conduct a non-attribution analysis. Indeed, in such circumstances, the authority can appropriately attribute all injury to the dumped imports.

20. The AD Agreement does not specify the particular methods and approaches an authority may use to conduct a non-attribution analysis. The question of whether an investigating authority's analysis is consistent with Article 3 should turn on whether the authority has in fact evaluated these factors and whether its evaluation is supported by positive evidence and reflects an objective examination, as required by Article 3.1.

21. The United States takes no position on Canada's factual assertions regarding MOFCOM's analysis under Article 3.5. Based on the above discussion of the applicable provisions, however, the United States observes that the Panel must determine whether the investigating authority demonstrated that it examined other "known factors" within the meaning of Article 3.5 of the AD Agreement, and based its causation analysis on an objective examination of all relevant evidence.

EXECUTIVE SUMMARY OF THE RESPONSES OF THE UNITED STATES OF AMERICA TO THE PANEL'S QUESTIONS TO THE THIRD PARTIES

22. Under the text of the AD Agreement, a difference exists between the volume consideration in the first sentence of Article 3.2, and the consideration, under Articles 3.4 and 3.5, of whether there is a causal relationship between subject imports and the state of the domestic industry. With regard to the application of the first sentence of Article 3.2, the use of the word "or" indicates that for this element of the analysis, an absolute increase could suffice. In particular, Article 3.2 states that "the investigating authorities shall consider whether there has been a significant increase in dumped imports, *either* [1] in absolute terms *or* [2] relative to production *or* [3] consumption in the importing Member" (emphasis added). As these three methods of measuring change in volume are expressed in the alternative, in any particular investigation, Article 3.2 does not require an investigating authority to consider volume in all three contexts if the authority considers volume to be significant in one of the contexts.

23. The AD Agreement contains a distinction between the volume analysis required under the first sentence of Article 3.2, and the analysis required under Articles 3.4 and 3.5. Accordingly, the United States does not agree that any kind of "mini-causation" analysis is required in connection with the consideration of the volume of dumped imports under the first sentence of Article 3.2. With respect to volume, Article 3.2 requires an investigating authority to consider a single question: whether there has been a significant increase in subject imports when viewed in any of several possible contexts. Articles 3.4 and 3.5, on the other hand, respectively address the multifaceted relationship among "all relevant factors having a bearing on the state of the [domestic] industry" and predicate an affirmative determination on "[t]he demonstration of a causal relationship between the dumped imports and the injury to the industry. . . based on an examination of all relevant evidence before the authorities."

24. In the United States' view, an investigating authority is required to consider and examine all of the factors listed in the provisions of Article 3, and to carry out the obligations contained therein, in a manner consistent with the overarching obligations of Article 3.1. To that end, the AD Agreement does not set out a specific sequence in which these considerations and examinations must occur.

25. The obligations to consider price effects, in Article 3.2, and the impact of dumped imports on the domestic industry, in Article 3.4, are not contingent on whether an investigating authority considers a volume increase to be significant. Thus, even if an investigating authority considers that there is no significant increase in subject imports, either in absolute or relative terms, the authority must consider price effects and impact.

26. The last sentences of Articles 3.2 and 3.4 recognize that an authority should weigh the evidence developed in an investigation based on the particular conditions of the industry being investigated and the conditions of competition in which that industry operates, and that some of the factors discussed may be more important in certain investigations than in others. These sentences also underscore that authorities should consider and examine *all* of the relevant evidence in an investigation, and not give undue weight to isolated factors.