EUROPEAN COMMUNITIES – DEFINITIVE ANTI-DUMPING MEASURES ON CERTAIN IRON OR STEEL FASTENERS FROM CHINA

(AB-2011-2)

THIRD PARTICIPANT SUBMISSION OF THE UNITED STATES OF AMERICA

April 15, 2010

Service List

Appellant/Appellee

H.E. Mr. Angelos Pangratis, Permanent Delegation of the European Union

Appellee/Other Appellant

H.E. Mr. Yi Xiaozhun, Pemanent Mission of the People's Republic of China

Third Participants

H.E. Mr. Roberto Carvalho de Azevedo, Permanent Mission of Brazil
H.E. Mr. John Gero, Permanent Mission of Canada
H.E. Mr. Mario Matus, Permanent Mission of Chile
H.E. Mr. Eduardo Munoz Gomez, Permanent Mission of Colombia
H.E. Mr. Jayant Dasgupta, Permanent Mission of India
H.E. Mr. Yoichi Otabe, Permanent Mission of Japan
H.E. Ms. Elin Østebø Johansen, Permanent Mission of Norway
Mr. Yi-Fu Lin, Permanent Mission of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu
H.E. Mr. Krisda Piampongsant, Permanent Mission of Thailand
H.E. Mr. Bozkurt Aran, Permanent Mission of Turkey

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I. Introduction

1. The United States welcomes this opportunity to provide its views on certain issues raised in this dispute, in which both the European Union and China appeal certain findings by the Panel. The United States has a strong interest in the proper interpretation and application of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "AD Agreement") and the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994").

2. In this submission, the United States addresses five issues on appeal: (1) the proper interpretation of Article 6.10 of the AD Agreement, (2) the Panel's finding that it is inconsistent with Article I:1 of the GATT 1994 for an investigating authority to require non-market economy firms to demonstrate sufficient independence from the State before it calculates an individual dumping margin for those firms, (3) the Panel's interpretation of Article 9 of the AD Agreement (4) whether the 30-day response period referred to by Article 6.1.1 is applicable only with respect to the original antidumping questionnaire, and (5) the Panel Report's analysis of Articles 3.1 and 4.1 of the AD Agreement regarding the definition of the domestic industry.

II. The Panel's Interpretation of Article 6.10 of the AD Agreement Is Flawed

3. In its appeal, the European Union asserts that the Panel improperly found Article 9(5) of Council Regulation (EC) No. 1225/2009 ("Basic AD Regulation") to be "as such" inconsistent with Article 6.10 of the AD Agreement, and inconsistent as applied in Council Regulation (EC) No. 91/2009 imposing definitive anti-dumping measures on certain iron or steel fasteners from China (the "fasteners investigation determination").[1] The United States takes no position as to whether the Basic AD Regulation or the fasteners investigation determination is inconsistent with Article 6.10 of the AD Agreement. However, the United States notes that the Panel's finding in this regard appears to be based on a misinterpretation of this provision of the AD Agreement.

4. The United States *agrees* with the Panel that: (1) the facts of a particular investigation may support a finding that two or more legally distinct companies are sufficiently close to be considered a singled exporter or producer;[2] and (2) the facts of a particular case may support finding that one or more nominally distinct producers or exporters is sufficiently related to the State to justify treating them as a single exporter or producer.[3] However, the United States *disagrees* with the Panel's findings that: (3) Article 6.10 precludes the investigating authority from requiring that an NME exporter or producer demonstrate that it is sufficiently independent from the State to warrant individual treatment[4]; and (4) Article 6.10 precludes the investigating authority, in assessing whether an exporter or producer is sufficiently independent from the State,

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[1] *See, e.g.*, EU Appellant Submission, paras. 14 and 228.

[2] Panel Report, para. 7.92.

[3] Panel Report, para. 7.94.

[4] Panel Report, para. 7.96.

from considering factors relating to the role of the State in the way business is conducted in the NME at issue.[5]

5. The United States agrees with the Panel that the facts of a particular case may support finding that two or more legally distinct companies are so closely connected that the firms effectively constitute a single "exporter" or "producer" within the meaning of Article 6.10 of the AD Agreement, and that the investigating authority may calculate a single dumping margin for these firms.[6]

6. These conclusions are grounded in the text of Article 6.10 which states that the "authorities shall, as a rule, determine an individual margin of dumping for each known *exporter* or *producer* concerned of the product under investigation." (emphasis added). The rule in Article 6.10 for an investigating authority to determine an individual margin of dumping applies only in respect of each known "exporter" or "producer" and, therefore, before assigning an individual dumping margin to a firm, the investigating authority must decide whether that firm is an "exporter" or "producer."[7]

7. As the Panel recognized, the reasoning of the panel in *Korea – Paper* directly supports this interpretation of Article 6.10 of the AD Agreement.[8] In that dispute, Indonesia argued that Article 6.10 of the AD Agreement requires an investigating authority to calculate an individual margin of dumping for each separate legal entity.[9] The panel rejected this interpretation of Article 6.10, noting that several provisions of the AD Agreement "confirm that the Agreement recognizes that relationships between legally distinct entities may impact behaviour and are thus relevant to the application of the rules of the Agreement."[10] The panel in *Korea – Paper* concluded:

> Article 6.10 does not necessarily preclude treating distinct legal entities as a single exporter or producer for purposes of dumping determinations in anti-dumping investigations. . . . Whether or not the circumstances of a given investigation justify such treatment must be determined on the basis of the record of that investigation. In our view, in order to properly treat multiple companies as a single exporter or producer in the context of its dumping determinations in an

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[5] Panel Report, para. 7.93.

[6] Panel Report, para. 7.92. The European Union is also in apparent agreement on this point. EU Appellant Submission, para. 141.

[7] EU Appellant Submission, paras. 139-141.

[8] Panel Report, para. 7.92.

[9] *See Korea – Paper*, para. 7.155.

[10] *Korea – Paper*, para. 7.160. The Appellate Body similarly recognized that under certain circumstances, separate legal entities may constitute a "single economic enterprise" such that sales between them may not reflect ordinary market principles. *See US – Hot-Rolled Steel (AB)*, paras. 141-144.

> investigation, the IA has to determine that these companies are in a relationship close enough to support that treatment.[11]

It is notable that, as a third party in the *Korea – Paper* dispute, China was supportive of this aspect of the panel's findings and argued that investigating authorities have discretion under the covered agreements to collapse firms and calculate a single margin of dumping for them.[12]

8. The United States also agrees with the Panel that the facts of a particular case may support finding that one or more nominally distinct producers or exporters is sufficiently related to the State to justify treating them as a single exporter or producer.[13] After referencing the reasoning of *Korea – Paper*, the Panel found that Article 6.10 permits an investigating authority to conclude that individual firms and the State constitute a single "exporter" or "producer":

> [W]e do not by any means exclude the possibility that in a given investigation the investigating authorities might determine that one or more nominally distinct producer(s) or exporter(s) is/are, in fact, sufficiently related to the State to justify concluding that they are a single producer or exporter. In such a situation, the authorities could well treat the producer(s)/exporter(s) and the State as a single exporter, calculate a single dumping margin for, and assign a single duty to, that single exporter.[14]

9. The United States agrees with the Panel that the relationship between exporters or producers and the State may be relevant to determining whether two entities constitute a single exporter or producer, and that depending on the facts, legally distinct exporters and producers may be considered sufficiently related to the State to constitute a single "exporter" or "producer" within the meaning of Article 6.10. However, the United States disagrees with the Panel's further consideration of this issue.

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[11] *Korea – Paper*, para. 7.161.

[12] *Korea – Paper*, para. 5.26 ("In China's view, there is no reason to believe that the Agreement absolutely excludes and prohibits the 'collapsing' of affiliated respondents in any situations. Considering it is a spirit of the Agreement to conduct a 'fair comparison' between the export price and the normal value when determining dumping margins, if the existence of affiliation to any extent damages the 'fair comparison', the investigating authorities shall be permitted to collapse such affiliation. In addition, a reference of this Article 9.5 of the Agreement can also imply, to some extent, in the whole context of the Agreement that the Agreement actually does not exclude the consideration of collapsing affiliated parties when determining dumping margins. Therefore, *the investigating authorities shall have discretion as to collapse affiliated responding corporations and determine a single dumping margin for them*.") (emphasis added).

[13] Panel Report, para. 7.94.

[14] Panel Report, para. 7.94.

A. Article 6.10 Does Not Prohibit the Investigating Authority from Requiring that an NME Exporter or Producer Demonstrate that it Is Sufficiently Independent from the State To Warrant Individual Treatment

10. Although the Panel agreed with the reasoning of the panel in *Korea – Paper*, it nonetheless found that the operation of Article 9(5) of the Basic AD Regulation was "fundamentally different" from the measure at issue in that case.[15] This finding was based, in part, on the Panel's flawed interpretation of Article 6.10 as prohibiting an investigating authority from requiring a non-market economy exporter or producer to demonstrate its independence from the State before providing it with an individual margin of dumping. The Panel found that such an approach would impermissibly shift the burden of proof to non-market economy firms and was to be contrasted with the test at issue in *Korea – Paper*:

> [T]here is an important difference between the test applied by the panel in [*Korea – Paper*] and the one applied under Article 9(5) of the Basic AD Regulation with respect to the burden of proof. Under the test applied by the panel in [*Korea – Paper*], the investigating authorities have to show that there is a sufficiently close structural and commercial relationship between individual producers to justify treating them as a single entity. If this cannot be demonstrated, the authorities, pursuant to the first sentence of Article 6.10, must treat each legal entity as a separate producer/exporter, and calculate individual dumping margins for each of them. An investigating authority applying this test starts from the premise that each exporter or foreign producer will be considered separately. Should it appear that this is not the case in a particular investigation, the investigating authority must obtain evidence on the basis of which it can affirmatively conclude that two or more of these nominally distinct entities are appropriately treated as a single exporter or producer. Under EU Article 9(5) of the Basic AD Regulation, however, the starting point is the presumption that NME producers are related to the State, as a result of which nominally distinct producers will not be considered separately in any investigation. In every case involving NME producers, the burden is on each such producer seeking individual treatment to provide evidence with respect to the EU Article 9(5) criteria sufficient to overcome the presumption to the satisfaction of the Commission. The difference in the starting points of the two tests, and the different evidentiary burdens involved, in our view, show how different these two tests are.[16]

11. The United States disagrees with the Panel's interpretation. While referencing Article 6.10 of the AD Agreement, the Panel fails to ground its analysis in the text of that provision. Nothing in that provision prescribes the burden of proof to be applied or how the investigating

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[15] Panel Report, paras. 7.93-7.94.

[16] Panel Report, para. 7.95.

authority is to assess the evidence before it. Nor is the Panel's attempt to distinguish this case from *Korea – Paper* persuasive.

12. The Panel's interpretation of Article 6.10 as prescribing a single rule for how investigating authorities must weigh evidence in all cases does not accord with the recognition elsewhere in the WTO Agreements that non-market economies may present additional factual complexities in an AD investigation. The AD Agreement permits an investigating authority to require relevant evidence at appropriate times during an investigation. The relevance of particular evidence may differ depending on whether firms are operating in market or non-market economies. For example, the interpretative *Ad* Note 2 to Article VI:1 of the GATT 1994 provides that dumping comparisons with domestic prices may not be possible in economies in which State interference is pervasive (*i.e.*, non-market economies). In accordance with these provisions, Members have routinely applied an alternative antidumping methodology for imports from non-market economies which bases normal value on data from an analogue country.[17] Not employing a strict comparison with domestic prices results in a host of different evidentiary requirements such as gathering certain production data from non-market economy firms or price data from an analogue country. In this regard, the United States understands that the European Union based normal value in the fasteners investigation on an analogue country and China has not challenged the basis for this methodological choice or the distinct evidentiary requirements which resulted from this methodology.

13. The *Protocol on the Accession of the People's Republic of China* ("the Protocol") also recognizes the pervasive government interference in the Chinese economy and that Members may need to establish different evidentiary requirements for firms operating in China.[18] For example, the Protocol provides that a dumping comparison using costs or prices in China is not required for imports from China *unless and until* investigated Chinese firms clearly show that market conditions exist in the industry producing the like product.[19] Thus, there is a recognition under the Protocol that, absent a demonstration to the contrary by Chinese producers, government interference will prevent market principles from functioning in the Chinese industry manufacturing the product under consideration. Accordingly, this provision indicates that Members may need to establish different evidentiary requirements for firms if they are operating in China – information requirements that are driven by the nature of China's non-market economy.

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[17] *See generally*, EU Appellant Submission, paras. 24-28.

[18] *Protocol on the Accession of the People's Republic of China*, WT/L/432 (November 23, 2001).

[19] *See Protocol on the Accession of the People's Republic of China*, Part I, para. 15(a)(ii) ("The importing WTO Member may use a methodology that is not based on a strict comparison with domestic prices or costs in China if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product.").

B. Article 6.10 Does Not Prohibit an Investigating Authority from Considering the Role of the State in the Way Business Is Conducted To Determine Whether a Firm Should Receive an Individual Margin of Dumping

14. The Panel also erred in interpreting Article 6.10 of the AD Agreement as prohibiting an investigating authority from using criteria such as those established in Article 9(5) of the Basic AD Regulation to determine whether a firm is separate from the State such that the investigating authority must determine an individual margin of dumping for that entity. The Panel stated:

> We recall that the relevant criteria in Article 9(5) of the Basic AD Regulation are, *inter alia*: whether producers are allowed to repatriate capital and profits; whether export prices and quantities are freely determined; the involvement of the State in ownership of companies; and whether exchange rate conversions are carried out at market rates. These conditions *relate to the role of the State in the way business is conducted in a given country*, as opposed to the criteria considered by the panel in [*Korea – Paper*], which relate to the commercial relationship between nominally distinct companies. The European Union's approach essentially presumes that the State should be considered as a "parent company" for potentially thousands of distinct legal entities producing and exporting a product under investigation, and only if these entities can demonstrate their independence will they receive an individual dumping margin calculation. We do not consider this to be a plausible application of the reasoning of the panel in [*Korea – Paper*].[20]

15. As this quote demonstrates, the Panel's reasoning is based on what the Panel perceived as an apparent distinction between the criteria established by Article 9(5) of the Basic AD Regulation, which the Panel saw as relating to "the role of the State in the way business is conducted in a given country," and the reasoning of the panel in *Korea – Paper*, which "was based on the structural and commercial relationships between separate legal entities producing the exported product."[21] The Panel recognized that the investigating authority, in a given situation, might determine that one or more distinct producers are sufficiently related to the State to warrant treating them as an individual exporter or producer, but that "the criteria in Article 9(5) of the Basic AD Regulation do not in our view serve the purpose of finding this type of relationship between the State and individual exporters."[22] As discussed below, there is simply no basis in either the covered agreements or in logic for the distinction the Panel attempts to draw.

16. The AD Agreement neither defines "exporter" nor "producer," nor sets out criteria for the investigating authority to examine before concluding that a particular firm or group of firms

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[20] Panel Report, para. 7.93 (emphasis added).

[21] Panel Report, para. 7.93.

[22] Panel Report, para. 7.94.

constitutes an "exporter" or "producer." Nor does the text of Article 6.10 require an investigating authority to determine an individual margin of dumping for each firm solely on the basis of the firm's mere assertion that it is, in fact, an exporter or producer. Instead, this determination, including the selection of criteria to employ in making this determination, would appear to fall within the discretion of the investigating authority. Indeed, as noted above, China, as a third party in the *Korea – Paper* dispute, argued that investigating authorities should enjoy such discretion.[23]

17. In understanding what criteria an investigating authority might consider to determine whether a firm is sufficiently independent to constitute an individual exporter or producer, it is useful to consider a basic example. Consider a parent company that has four factories manufacturing the product under consideration: each factory is separately incorporated and wholly-owned by the parent company, and each of these factories claims entitlement to an individual margin of dumping. Although there are five distinct legal entities, commercial decisions, including decisions pertaining to production and export of the product under consideration, are conducted by the parent company. Given that the parent company makes decisions, *inter alia*, related to production priorities and pricing, it would be illogical and would compromise the effectiveness of the antidumping remedy to consider the parent company and each factory a separate "producer" or "exporter," and assign each an individual margin. Nothing in Article 6.10 requires such a result.

18. Similarly, the relationship between firms in a non-market economy can be the direct result of interference from the State. As the term suggests, a non-market economy is an economy in which the role of the State tends to distort the functioning of market principles. In a non-market economy, such as China, this interference may take many forms including, for example, by the State allocating resources or setting prices on an administrative basis. Such interference would exert influence over firms and prices. Such government influence over firms could lead to the State making business decisions for the individual firms, the State forcing the firms to harmonize their business activities to fulfill the State's objectives, or the State shifting production between the companies. In such a situation the State is analogous to a parent company that makes decisions related to production priorities and pricing and, consistent with the panel report in *Korea – Paper*, an investigating authority could find that the firms and the State should be treated as a single exporter or producer and subject to a single dumping margin.[24] Thus, contrary to the Panel's reasoning, it is entirely logical for an investigating authority to consider the role of the State in the way business is conducted when determining whether a firm constitutes an individual exporter or producer.

19. There is substantial evidence that such State interference exists in the Chinese economy. For example, during China's accession negotiations, Members expressed concerns about the

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[23] *Korea – Paper*, para. 5.26.

[24] *Korea – Paper*, para. 7.165.

influence of the government of China in the commercial practices and decisions of enterprises in China.[25] Additionally, the Protocol confirms that China's accession to the WTO was premised on such State interference in the economy because, as discussed above, it provides that a dumping comparison using costs or prices in China is not required for imports from China unless and until investigated Chinese firms clearly show that market conditions exist in the industry producing the like product. This provision of the Protocol confirms that it is permissible for an investigating authority to recognize government interference will prevent market principles from functioning in the Chinese industry manufacturing the product under consideration unless and until Chinese firms provide evidence to the contrary.

20. Given these facts, it is logical that the investigating authority would first need to confirm, at the very least, that the company functions as an exporter or producer separate from the State before assigning an individual dumping margin to an exporting company in a non-market economy country. Otherwise, if the exporter's prices or production priorities were set by the State, there would be no objective basis for assigning that company its own dumping margin. China argues that it is incorrect to compare the operation of Article 9(5) of the Basic AD Regulation to the measure at issue in *Korea – Paper* because the European Union has a methodology which it applies prior to Article 9(5) that identifies whether different legal entities should be regarded as one economic unit for purposes of the dumping margin calculation.[26] According to China this means that Article 9(5) must be a "different test" from the measure at issue in *Korea – Paper*, "the purpose of which is not, as the EU alleges, to identify the single supplier to the product concerned."[27] Even assuming *arguendo* that China is correctly characterizing the European Union's antidumping methodology, this merely establishes that, in the same antidumping investigation, the European Union may analyze relationships between firms *and* relationships between firms and the State and that in conducting these analyses the investigating authority may use distinct criteria. But the fact that distinct criteria are used does not detract from the fact that the analyses are aimed at the same result, determining whether relationships exists which indicate that multiple firms *or* firms and the State effectively operate as one economic unit and, thus, should be treated as a single exporter or producer.[28]

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[25] *See, e.g., Report of the Working Party on the Accession of China*, para. 150 (members of the Working Party noted that special difficulties could arise because China had not yet transitioned to a full market economy); paras. 50-51 (members of the Working Party expressed concerns about the Chinese government's use of price controls).

[26] China Appellee Submission, para. 177.

[27] China Appellee Submission, para. 183 (citations ommitted).

[28] China also argues at paras. 170-174 of its Appellee Submission that it is incorrect to compare Article 9(5) of the Basic AD Regulation to the measure at issue in *Korea – Paper* because the latter was focused on determining whether separate legal entities that *exported* were sufficiently related to constitute a single entity while under Article 9(5) of the Basic AD Regulation there is no indication that the State is a legal entity that exports. This argument ignores the fact that, if an exporting firm is not independent from the State, then the State is effectively the exporting entity. For example, through its influence over one or more exporting firms, the State could be setting the exporters' pricing or production priorities and, under this scenario, the State, together with the firm, would be correctly considered the "exporter" or "producer" for purposes of the dumping determination.

21. In addition, China appears to suggest that requiring companies from non-market economies to demonstrate that they qualify for individual margins results in application of a rigid and burdensome rule to Chinese firms.[29] The United States disagrees. Allowing firms from non-market economies such as China to qualify for individual treatment once they demonstrate that they function as individual exporters or producers, separate from the State, provides investigating authorities with the necessary flexibility to respond to changes in these non-market economies. That is, if the State is less involved in the business decisions of firms in non-market economies, tests such as the individual treatment test provide exporters and producers an opportunity to supply such evidence and investigating authorities with the ability to recognize these changes in the economy. Indeed, it appears from the fasteners investigation that the European Union recognizes a certain degree of market reform in the Chinese economy given that *all* the cooperating Chinese firms that requested individual margins received them.

III. The Panel Incorrectly Applied GATT Article I:1

22. The European Union also appeals the Panel's finding that Article 9(5) of the Basic AD Regulation violates Article I:1 of the GATT 1994. The EU argues that "treating two situations which are different in nature in a different manner does not imply discrimination between like products from different countries and, thus, does not amount to a violation of the MFN principle."[30] China argued before the Panel that Article 9(5), by automatically determining an individual dumping margin and an individual dumping duty for exporting producers for certain WTO Members, constituted an "advantage" or "favour" within the meaning of Article I:1 of the GATT 1994. By failing to grant that same "advantage" to China, China asserted Article 9(5) violated Article I:1.[31] The Panel concluded that Article 9(5) was inconsistent with Article I:1 of the GATT 1994 because "it is clear that the application of Article 9(5) will, in certain situations, result in imports of the same product from different WTO Members being treated differently in anti-dumping investigations conducted by the European Union."[32]

23. The United States disagrees with the Panel's finding. Article 9(5) of the Basic AD Regulation appears designed to address a particular condition associated with non-market economies, i.e., pervasive state interference in the market. Chinese products pose methodological challenges to investigating authorities trying to determine costs and prices in connection with those products because they originate in an economy with continuing significant levels of State interference in the operation of the domestic market. The nature of China's economy requires investigating authorities to develop mechanisms that will allow them to make those necessary determinations, as recognized in China's Protocol. As these methodological

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[29] *See, e.g.,* China First Written Submission, para. 37.

[30] EU Appellant Submission, para. 219.

[31] China First Written Submission, paras. 97-98.

[32] Panel Report, para. 7.124.

difficulties do not exist in the context of market economies, Members have routinely applied alternative antidumping methodologies for imports from non-market economies.

24. A number of WTO rules explicitly recognize that, in the context of AD and CVD proceedings, products from one Member may be treated differently from those of another Member. For example, and as discussed above, *Ad* Note 2 to Article VI:1 of the GATT recognizes that dumping comparisons with domestic prices may not be possible in economies in which State interference is pervasive. Similarly, China's Accession Protocol provides that a dumping comparison using costs or prices in China is not required unless and until investigated Chinese firms show that market conditions exist in the industry. Thus, various provisions of the WTO agreements provide for situations in AD and CVD proceedings where products from one Member may be treated differently from those of another Member, without contravening the obligation in Article I:1 of the GATT 1994.

IV. The Panel Misinterpreted Article 9 of the AD Agreement

25. The Panel also found that Article 9(5) of the Basic AD Regulation is inconsistent with Article 9.2 of the AD Agreement. This finding rests primarily on the sentence in Article 9.2 which states: "[t]he authorities shall name the supplier or suppliers of the product concerned."[33] According to the Panel, this provision should be interpreted as requiring an investigating authority to name the exporters or producers on which anti-dumping duties are imposed and that such a requirement, in turn, prohibits an investigating authority from imposing a country-wide antidumping duty in an investigation involving a non-market economy.[34] The Panel concluded that, because Article 9(5) of the Basic AD Regulation permits the imposition of a country-wide duty unless an exporter or producer shows independence from the State, that provision breaches Article 9.2 of the AD Agreement.[35] In the view of the United States, this finding is premised on fundamental misunderstandings of Article 9 of the AD Agreement.

26. As an initial matter, the United States notes that Article 9 discusses the *imposition* of antidumping duties with respect to *products*, not individual exporters or producers.[36] In this regard, the concept of *imposing* antidumping duties *on exporters or producers*, as discussed by the Panel,[37] is found nowhere in the AD Agreement.

27. Furthermore, the portion of Article 9.2 of the AD Agreement to which the Panel cites

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[33] Panel Report, para. 7.112.

[34] Panel Report, para. 7.112.

[35] Panel Report, para. 7.112.

[36] *See, e.g.,* Article 9.2 of the AD Agreement ("When an anti-dumping duty is imposed in respect of any *product*...") (emphasis added).

[37] *See, e.g.,* Panel Report, para. 7.107 (where the Panel states that the requirement to name each supplier "entails the imposition of individual anti-dumping duty").

requires authorities "to name the suppliers," not calculate individual margins of dumping for each firm requesting an individual margin. Even if one were to assume *arguendo* that the Panel was correct to equate the term "suppliers" in Article 9.2 with "exporters" or "producers" for which individual margins are calculated under Article 6.10,[38] Article 9.2 in no manner prescribes that investigating authorities must calculate individual dumping margins for the suppliers (or exporters or producers). Instead, under this interpretation, Article 9.2 would establish, at most, that an investigating authority must *name* the exporters and producers for which individual margins have been calculated.

28. That is not to say that there is no relationship between the determination of dumping margins discussed in Article 6.10 and the imposition of duties under Article 9 of the AD Agreement. For example, Article 9.3 establishes that the amount of a dumping duty shall not exceed the margin of dumping established under Article 2.[39] Similarly, in respect of exporters or producers not individually examined in situations falling under the second sentence of Article 6.10, Article 9.4(i) limits the amount of a dumping duty to the weighted average margin established with respect to the selected exporters and producers. Thus, the dumping margin of an individual exporter or producer establishes (under Article 9.3), or is the basis for determining (under Article 9.4(i)), the maximum amount of dumping duties that may be collected on the products exported by such exporter or producer. In this regard, Article 9.3 and 9.4 establish links between the dumping margin of the individual exporter or producer and the dumping duties collected on the products of that exporter or producer. These links, however, do not provide a basis for finding that Article 9 of the AD Agreement requires an investigating authority to calculate individual margins of dumping for certain firms.

29. In any event, the Panel's finding pursuant to Article 9.2 of the AD Agreement appears to be dependent on its finding under Article 6.10.[40] For the reasons discussed above, the Panel's finding pursuant to Article 6.10 of the AD Agreement is based on an incorrect understanding of that provision. As a result, there is no basis to support the Panel's consequential finding pursuant to Article 9.2 of the AD Agreement.

V. The Panel Correctly Interpreted Article 6.1.1 of the AD Agreement

30. China argues that the Panel misinterpreted Article 6.1.1 of the AD Agreement because the Panel found that the 30-day response period in this provision did not apply to the market

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[38] *See* Panel Report, para. 7.110 (equating the term "supplier" under Article 9.2 with "exporter" or "producer" under Article 6.10 of the AD Agreement).

[39] Although Article 2 itself does not contain a provision relating the dumping margin to the amount of duties collected, the reference to Article 2 in Article 9.3 makes clear that Article 2 sets out how to calculate the margin that serves as the maximum amount of duty imposed or collected.

[40] *See, e.g.,* Panel Report, para. 7.112 (reaching its finding with respect to Article 9.2 only after reading this provision "in parallel with the requirements of Article 6.10 of the AD Agreement . . .").

economy treatment (MET) and individual treatment (IT) claim forms.[41] As discussed below, the United States agrees with the Panel's interpretation. The 30 day response period applies only to the original antidumping questionnaire.

31. Article 6.1.1 provides, in relevant part: "[e]xporters or foreign producers receiving questionnaires used in an anti-dumping investigation shall be given at least 30 days for reply." China argues that the term "questionnaires" in Article 6.1.1 encompasses many requests for information made by an investigating authority, as a result of which an exporter or foreign producers should be given at least 30 days to respond to every such request made in the course of an investigation.[42]

32. However, as the panel in *Egypt – Rebar* explained,[43] the context of Article 6.1.1 reveals that the term "questionnaire" for purposes of the AD Agreement refers to one *particular* request for information made by the investigating authority. Paragraph 6 of Annex I to the AD Agreement states: "Visits to explain *the questionnaire* should only be made at the request of an exporting firm." Paragraph 7 of the same Annex provides: "As the main purpose of the on-the-spot investigation is to verify information provided or to obtain further details, it should be carried out after the response to *the questionnaire* has been received." Paragraphs 6 and 7 of Annex I do not refer to "a questionnaire" or "questionnaires" in the abstract, but instead, to "*the* questionnaire," indicating that Members contemplated the existence of one document in particular that would pose questions from the investigating authority and would be considered "the questionnaire" for purposes of the AD Agreement.

33. The panel in *US – AD/CVD* reached a similar conclusion with respect to the term "questionnaires" in Article 12.1.1 of the SCM Agreement (which is analogous to Article 6.1.1 of the AD Agreement).[44] According to the panel in *US – AD/CVD*, "the term 'questionnaires', as used in Article 12.1.1 of the SCM Agreement, refers to the initial comprehensive questionnaire (or set of questionnaires) issued by an investigating authority at or following the initiation of a countervailing duty investigation covering the spectrum of issues on which the investigating authority will have to make determinations in relation to subsidization of the investigated product, injury and causation."[45] Notably, China did not appeal this finding.

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[41] *See, e.g.,* China Other Appellant Submission, para. 500-503.

[42] *See, e.g.,* China Other Appellant Submission, para. 538 (stating that the term "questionnaire": "covers substantial information requests through a series of questions which are so substantial that they deserve verifications being carried out and to the extent that they do not prevent the investigating authorities from complying with the time-frames set out in the AD Agreement, which seems not be the case when such requests are made at the outset of the investigation.").

[43] *See Egypt – Rebar*, para. 7.276.

[44] *US – AD/CVD (Panel)*, para. 15.31. Article 12.1.1 of the SCM Agreement provides, in relevant part: "Exporters, foreign producers or interested Members receiving questionnaires used in a countervailing duty investigation shall be given at least 30 days for reply." (Footnote omitted).

[45] *US – AD/CVD (Panel)*, para. 15.37.

34. The original antidumping questionnaire in an investigation is the single document contemplated by the term "the questionnaire" in paragraphs 6 and 7 of Annex I. Because this antidumping questionnaire is the first opportunity for the investigating authority to seek information on all of the issues raised by the application under Article 5, it is typically the most extensive request for information made in the course of an antidumping investigation. Given the breadth of information requested in the initial antidumping questionnaire, it is logical that the Agreement seeks to provide a minimum time period for respondent firms to collect the information needed to be responsive to the investigating authority.

35. The opportunity provided by an investigating authority to permit Chinese companies to claim MET or IT is a precursor to the issuance of the actual antidumping questionnaire, and therefore not subject to the obligations in Article 6.1.1. Indeed, the information submitted by companies requesting IT enables the investigating authority to identify those individual companies entitled to receive the antidumping questionnaire for which the minimum 30-day response period applies. The obligation in Article 6.1.1 to provide thirty days for reply therefore applies only to the original antidumping questionnaire and not to the MET and IT claim forms that are the subject of China's claim under this provision.

36. The United States notes that, notwithstanding the Article 6.1.1 claim advanced by China in this dispute, China's own investigating authority appears to recognize that the 30-day time period for reply does not apply to every request for information made by an investigating authority. As discussed above, Article 12.1.1 of the SCM Agreement is worded almost identically to Article 6.1.1 of the AD Agreement, setting out the requirement for 30 days to respond to questionnaires in CVD investigations. In a recent CVD investigation on Grain-Oriented Electrical Steel (GOES) from the United States, the Chinese Bureau of Fair Trade for Imports and Exports (BOFT) issued multiple requests for information to the U.S. Government following the original questionnaire, including new subsidy allegation and supplemental questionnaires. For *none* of these requests for information, submitted before the Panel as Exhibit US-1, did China provide an initial period of 30 days to respond.

VI. The Panel Report's Analysis of Articles 3.1 and 4.1 of the AD Agreement Regarding the Definition of the Domestic Industry Was Flawed

37. China appeals the Panel's finding that the European Union did not act inconsistently with Articles 3.1 and 4.1 of the AD Agreement with respect to the definition of the domestic industry in the fasteners investigation.[46] In challenging the EU definition of the domestic industry, China argues, among other things, that (i) the EU failed to make an injury determination based on an "objective examination" as required by Article 3.1 because producers that did not support the

[46] China Appellant Submission, paras. 30-278.

complaint were excluded from the definition of the domestic industry;[47] and (ii) the EU's definition of the domestic industry is inconsistent with Article 4.1 of the AD Agreement because it does not include domestic producers accounting for "a major proportion" of domestic production.[48] The United States agrees with China that the Panel Report's analysis of Articles 3.1 and 4.1 of the AD Agreement was flawed.

A. The Panel's Interpretation of Article 3.1 of the AD Agreement Is Flawed

38. Article 3.1 of the AD Agreement provides 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 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."[49] The Appellate Body in *US – Hot-Rolled Steel* stated that Article 3.1 requires that investigating authorities conduct their investigations "in an unbiased manner, without favoring the interests of any interested party, or group of interested parties, in the investigation."[50] In *Mexico – Rice*, for example, the Appellate Body found that the Mexican investigating authority had violated the Article 3.1 objectivity requirement by accepting petitioners' suggestion that it limit its injury analysis to data from the six month period in each of the three years examined, when subject import penetration happened to be highest.[51]

39. The Panel rejected China's claim that the EU's definition of the domestic industry was inconsistent with Article 3.1 of the AD Agreement, based, in part, on its finding that the EU had not acted to exclude producers that did not support the complaint from the definition of the domestic industry.[52] As described by the Panel in its report, the EU defined the domestic industry on the basis of those domestic producers that came forward and indicated a willingness to participate in the investigation within a 15-day period set out in the Notice of Initiation of the investigation. The EU did not include producers within the definition of the domestic industry that came forward after the 15-day period.[53]

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[47] China Appellant Submission, para. 9.

[48] China Appellant Submission, para. 10.

[49] Article 3.1, AD Agreement.

[50] *U.S. – Hot-Rolled Steel (AB)*, para. 193.

[51] *See Mexico – Rice (AB)*, paras. 183, 187-88 (affirming the panel's finding that the Mexican investigating authority had acted inconsistently with the objectivity requirement under Article 3.1 of the ADA by predicating its injury determination on data from only the first six months of each of the three years examined, which petitioners had advocated as the period in which import penetration was highest).

[52] Panel Report, para. 7.215 ("We consider that, on the facts before us, China has not demonstrated that the EU investigating authority in this case did, in fact, exclude producers that did not support the complaint from the domestic industry. In our view, this is demonstrated by the fact that at least one producer who did not affirmatively state support for the complaint was included in th domestic industry. In addition, while it seems clear that producers who did not make themselves known within the 15-day period established at initiation were not included in the domestic industry, we find that the investigating authority did not act to exclude such producers.").

[53] Panel Report, para. 7.191.

40. The Panel recognized that "[i]ssues might arise should an investigating authority systematically exclude from the domestic industry companies that produce the like product but do not support the complaint."[54] However, the Panel reasoned that no such issues arose because the EU only excluded domestic producers that did not make themselves known within the 15-day period, and even considered adding producers to the domestic industry in response to exporter arguments, though it ultimately did not do so.[55] The Panel considered that "it is reasonable for investigating authorities to impose deadlines for domestic producers to make themselves known and then define the domestic industry on the basis of those that come forward within the deadline."[56] The Panel also observed that the EU selected those producers with the largest production volumes for its original sample of seven producers,[57] and included in its sample one producer that was not a complainant.[58]

41. While the United States does not take a position on the particular facts at issue in this dispute, the United States agrees with China that a definition of the domestic industry that is narrowly limited to those parties who actively support or otherwise wish to participate in the investigation does not permit an "objective examination" of whether the domestic industry is experiencing material injury, within the meaning of Article 3.1 of the AD Agreement. In expressing "sympathy for the European Union's view that producers who do not support the complaint are not likely to cooperate," the Panel itself recognized that the producers most likely to cooperate, and make themselves known in response to the Notice of Institution, are those producers that support the complaint.[59] In turn, those producers supporting the complaint are also those most likely to have the least healthy performance. This is because domestic producers posting the weakest performance would have the most to gain from the imposition of an antidumping duty measure, and would therefore have a financial incentive to file a complaint or otherwise make themselves known. Conversely, domestic producers that were performing well financially would lack the incentive to participate in the investigation. Indeed, domestic producers posting the strongest performance would have every incentive to not make themselves known because withholding their relatively strong performance data from the investigating authority could only increase the probability that the investigating authority would make an affirmative injury or threat of injury determination.

42. Contrary to what the Panel appears to suggest, the mere fact that the EU based its selection on size, and the fact that the EU had a "process of considering additional producers for inclusion in the domestic industry based on arguments made by the exporters" would not

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[54] Panel Report, para. 7.215.

[55] Panel Report, para. 7.215.

[56] Panel Report, para. 7.219.

[57] Panel Report, para. 7.216.

[58] Panel Report, para. 7.219.

[59] Panel Report, para. 7.215.

necessarily support the conclusion that the EU had made an "objective examination" of the industry.[60] Even if the 15-day deadline for EU producers to make themselves known in response to the EU's notice was reasonable from the perspective of EU producers, as the Panel found,[61] the question is not whether the EU's process for defining the domestic industry was fair to EU producers. Rather, the question is whether the EU's process for defining the domestic industry resulted in a domestic industry definition that permitted an objective examination of positive evidence in accordance with Article 3.1 and satisfied the requirements of Article 4.1.

43. The United States also agrees with China that the Panel's Article 3.1 analysis was flawed insofar as it did not account for the EU's failure to make active efforts to collect data on all known EU fastener producers.[62] Article 5.1 of the AD Agreement contemplates that investigating authorities will conduct "an investigation to determine the . . . effect of any alleged dumping." The Appellate Body has noted the obligation on an investigating authority to carry out a "full investigation" in order to conduct a "proper evaluation," and stressed that it is the investigating authority, and not the interested parties, that must perform this task.[63]

44. The United States agrees with the EU and the Panel that, in investigations involving fragmented industries, reliance on data from less than all producers may reasonably be warranted.[64] The United States does not, however, agree with the Panel's suggestion that the fragmented nature of the EU fasteners industry necessarily justified the EU's exclusion of most known EU fastener producers from its definition of the domestic industry.[65] The facts found by the Panel indicate that the EU "contacted all known producers of the like product,"[66] by sending "sampling forms to 318 EU producers of fasteners, asking for certain basic information concerning their operations."[67] The facts found by the Panel also indicate that the EU subsequently sent sampling forms to an additional 54 producers, bringing the total number of EU producers contacted by the EU to 372.[68] In response, 114 EU fastener producers "came forward with relevant information."[69] Thus, the EU was in a position to send questionnaires requesting the full complement of domestic industry data to 372 known EU fastener producers. Had the same 114 producers that completed sampling forms also completed and returned domestic producer questionnaires, the EU would have possessed data on domestic producers accounting

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60 Panel Report, para. 7.215.

61 Panel Report, para. 7.219 & n.484.

62 Panel Report at para. 7.227.

63 *US – Wheat Gluten (AB)*, para. 55.

64 Panel Report, para. 7.230.

65 Panel Report, para. 7.230.

66 Panel Report, para. 7.191.

67 Panel Report, para. 7.213.

68 Panel Report, para. 7.213.

69 Panel Report, para. 7.213.

for 46 percent of EU production in 2006, based on the facts found by the Panel.[70] Perhaps more importantly, these data likely would have been more representative of the broad range of known domestic producers in terms of size and positions with regard to the antidumping complaint.

B. The Panel Erred in its Interpretation of Article 4.1 of the AD Agreement

45. The Panel rejected China's claim that the EU's definition of the domestic industry did not constitute a "major proportion" of domestic producers as required by Article 4.1 of the AD Agreement.[71] The Panel Report's analysis began by observing that all parties were in agreement that a "major" proportion is one that is "important, serious, or significant," and that a major proportion "may be something less than 50 percent, and . . . will depend on the facts of the case."[72] The Panel then rejected China's argument that investigating authorities must examine "non-quantitative factors" in satisfying the "major proportion" standard, finding that there is "no basis in the text of the AD Agreement to impose on investigating authorities an affirmative obligation to examine non-quantitative factors in defining a domestic industry on the basis of producers accounting for a major proportion of domestic production of the like product."[73] The Panel also opined that nothing in the text of Article 4.1 would require an investigating authority to define the domestic industry in a manner such that it is "somehow 'representative' of the whole of domestic production" or that "include[s] as many producers as is 'practically feasible,'" as China argued.[74] Finally, the Panel recalled that it had rejected China's claim that the EU had improperly excluded petition opponents from the domestic industry definition.[75] For these reasons, the Panel found that the EU had not acted inconsistently with Article 4.1.[76]

46. The Panel's view appears to be that, under Article 4.1, the EU could determine which producers it wished to include in the domestic industry using a process that favored petitioners and petition supporters, "so long as the producers that are included account for a sufficient quantity of domestic production to be considered a 'major proportion.'"[77] The United States disagrees and considers that such an interpretation of Article 4.1 is inconsistent with the text of Article 4.1 and would render meaningless the two specified exceptions in subparagraphs (i) and

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[70] Panel Report, para. 7.213.

[71] Panel Report, paras. 7.225-7.231, *citing Argentina – Poultry*, para 7.341.

[72] Panel Report, para. 7.226.

[73] Panel Report, para. 7.229.

[74] Panel Report, para. 7.230. Several third party participants who commented on this issue basically agreed with China. *See id.* at paras. 7.200 (Japan commented that "the primary requirement for the selection of a sample for the injury determination is that . . . the sample must be sufficiently representative of the domestic industry"), 7.201 (Norway commented that "the only category of producers that may be entirely excluded from the industry is 'related' producers, thereby insuring . . . that any determinations made with respect to the 'domestic industry' will be representative of that industry as a whole.").

[75] Panel Report, para. 7.230.

[76] Panel Report, para. 7.230.

[77] Panel Report, para. 7.230.

(ii) of Article 4.1 that allow for an investigating authority to depart from this inclusive standard.[78] As discussed above, the EU limited its definition of the "domestic industry" to the 46 producers that "expressed a wish to be included in the sample," selected the seven largest producers from this biased subset of the domestic industry, and then settled for a sample comprised of six of the producers after one producer "was considered as not cooperating."[79] Having failed to make active efforts to collect information for a large set of known EU fastener producers, the EU ultimately excluded most known EU fastener producers from its definition of the domestic industry.

47. The United States disagrees with the EU's argument that the "major proportion" referenced by Article 4.1 should be interpreted just to mean producers accounting for at least 25 percent of total domestic production, in light of the sufficiency of support from 25 percent of the industry to establish standing under Article 5.4. Article 5.4 imposes a standing requirement of at least 25 percent of "total production of the like product produced by the domestic industry," defined under Article 4.1 to mean "producers as a whole" or "those of them whose collective output constitutes a major proportion of . . . total domestic production."[80] The 25 percent standing requirement under Article 5.4 should not be read as setting a benchmark for the "major proportion" requirement under Article 4.1 when the 25 percent standing requirement itself must be judged against a broader domestic industry defined as domestic producers as a whole or those producers accounting for a major proportion of total domestic production.

VII. Conclusion

48. The United States thanks the Appellate Body for providing an opportunity to comment on the issues at stake in this proceeding, and hopes that its comments will prove useful.

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[78] *EC – Salmon*, para. 7.112 [footnote omitted] ("However, nothing in the text of Article 4.1 gives any support to the notion that there is any other circumstance in which the domestic industry can be interpreted, from the outset, as not including certain categories of producers of the like product, other than those set out in that provision. . . .").

[79] Panel Report, para. 7.216.

[80] The definition of domestic industry provided under Article 4.1 is "[f]or the purposes of this Agreement," including Article 5.4. See *Mexico – Pipe and Tube*, para. 7.324 ("The introductory clause of Article 4.1 indicates that the definition of 'domestic industry' applies '[f]or the purposes of this Agreement', *i.e.* throughout the Agreement. It would therefore also define the term 'domestic industry' as used in Article 5.4.").