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

(WT/DS397)

THIRD PARTY SUBMISSION OF THE UNITED STATES

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I. Introduction

1. The United States makes this third party submission to provide the Panel with its view of the proper legal interpretation of certain provisions of the *Agreement on 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") that are relevant to this dispute. The United States addresses in this submission the proper interpretation of the following provisions: (1) Article 6.10 and Article 9 of the AD Agreement; (2) Article X:3(a) of the GATT 1994; (3) Article 5.4 of the AD Agreement; (4) Articles 2.1 and 2.6 of the AD Agreement; (5) Article 3.1 of the AD Agreement; and (6) Articles 6.1.1, 6.2, 6.4, and 6.5 of the AD Agreement.

II. China's Objections to Article 9(5) of Council Regulation No. 1225/2009 Are Based on a Misunderstanding of the Obligations Under Articles 6.10 and 9 of the AD Agreement

2. China argues that Article 9(5) of Council Regulation No. 1225/2009 ("Basic AD Regulation") is inconsistent as such with Article 6.10 and, as a consequence, with Articles 9.2, 9.3, and 9.4 of the AD Agreement. As discussed below, while it takes no position on the merits of China's factual allegations, the United States disagrees with China's legal arguments because they are based on misunderstandings of the relevant provisions of the AD Agreement.

A. Article 6.10 of the AD Agreement Does Not Preclude an Investigating Authority's Finding that Multiple Legal Persons Constitute a Single "Exporter" or "Producer" for the Purpose of Determining Dumping Margins

3. According to China, Article 6.10 of the AD Agreement requires an investigating authority to calculate an individual margin of dumping for every interested party that identifies itself as an exporter or producer.[1] China states that the only exception to this rule applies when an investigating authority limits its examination due to the large number of exporters or producers.[2] China argues that Article 9(5) of the Basic AD Regulation requires Chinese exporters or producers to satisfy the EU's market economy treatment ("MET") or individual treatment ("IT") criteria in order to receive an individual dumping margin. Because these additional criteria are not found in Article 6.10 of the AD Agreement, China concludes that Article 9(5) is inconsistent with Article 6.10.[3]

4. China misunderstands the obligations found in Article 6.10 of the AD Agreement. This provision provides, in relevant part:

> 6.10 The authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under

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[1] *See, e.g.,* China First Written Submission, para. 55.

[2] *See, e.g.,* China First Written Submission, para. 64.

[3] *See, e.g.,* China First Written Submission, para. 65.

> investigation. In cases where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable, the authorities may limit their examination either to a reasonable number of interested parties or products by using samples which are statistically valid on the basis of information available to the authorities at the time of the selection, or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated.

5. The United States notes that the general requirement in Article 6.10 for an investigating authority to calculate an individual margin of dumping applies only in respect of each known "exporter" or "producer." Before assigning an individual dumping margin to a particular firm, however, the investigating authority must decide whether that firm is an "exporter" or "producer." The AD Agreement neither defines "exporter" or "producer", nor sets out criteria for the investigating authority to examine before concluding that a particular firm or group of firms constitutes an "exporter" or "producer." Therefore, there is nothing in the text of Article 6.10 that requires an investigating authority to calculate an individual margin of dumping for each company solely on the basis of the company's assertion that it is an exporter or producer. Instead, an investigating authority is permitted to conclude, based on the facts on the record, which entities constitute an individual "producer" or "exporter" as a condition precedent to calculating an individual dumping margin. This includes the right of the investigating authority to establish those factors that may be relevant to identifying an "exporter" or "producer," including by reference to the actual commercial activities and relationships of companies rather than their status as legally distinct entities.

6. The reasoning of the panel in *Korea – Paper* directly supports this interpretation of Article 6.10 of the AD Agreement. 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.[4] 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."[5] The panel 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

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[4] *See Korea – Paper*, para. 7.155.

[5] *Korea – Paper*, para. 7.160. The Appellate Body similarly recognized in *US – Hot-Rolled Steel* 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.

> producer in the context of its dumping determinations in an investigation, the IA has to determine that these companies are in a relationship close enough to support that treatment.[6]

The facts of a particular case may therefore support a finding that the nature of the relationship or operations of two or more legally distinct entities are so closely connected that the entities effectively constitute a single "exporter" or "producer" within the meaning of Article 6.10.

7. The rationale behind such an understanding of Article 6.10 can be illustrated by considering further a basic example where one parent company has four factories manufacturing the product under consideration, each separately incorporated and wholly-owned, 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.

8. An inquiry into the relationship between companies and the reality of their respective commercial activities is particularly relevant in the context of producers and exporters from a non-market economy. As the term suggests, a non-market economy is an economy in which the role of the government tends to distort the functioning of market principles. In a non-market economy, such as China, this interference may take many forms including the government exerting influence over companies and prices. Indeed, during China's accession negotiations, Members expressed concerns about the influence of the government of China in the commercial practices and decisions of enterprises in China.[7] Such government influence over companies could lead to the government making business decisions for the individual companies, the government forcing the companies to harmonize their business activities to fulfill the government's objectives, or the government shifting production between the companies. Consistent with the panel report in *Korea – Paper*, each of these factors would support a finding by the investigating authority that companies should be treated as a single exporter and subject to a single dumping margin.[8]

9. The *Protocol of the Accession of the People's Republic of China* ("Protocol") also recognizes the pervasiveness of government interference in the Chinese economy. Article 15 of

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[6] *Korea – Paper*, para. 7.161.

[7] *See, e.g., Working Party Report on Accession of China*, paras. 43-49 (members of the Working Party expressed concerns about the continuing government influence and guidance of enterprises in China); paras. 50-64 (members of the Working Party expressed concerns about the government's use of price controls).

[8] *Korea – Paper*, para. 7.165.

the Protocol provides that a dumping comparison using domestic costs and prices in China is not required for imports from China *unless and until* investigated producers clearly show that market conditions exist in the industry producing the like product.[9] Thus, the presumption under the Protocol is 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. Given this presumption of government interference, it would make little sense for an investigating authority to assign an individual dumping margin to an exporting company in a non-market economy country without first confirming, at the very least, that the company functions as an exporter separate from the government, e.g., evidence that export prices are not set by the government or subject to governmental approval at the firm level. Otherwise, if the exporter's prices were set by the government, there would be no objective basis for assigning that company its own dumping margin.[10]

10. 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 companies.[11] The United States disagrees. Allowing companies from non-market economies such as China to qualify for individual treatment once they demonstrate that they function as exporters, separate from the government, provides investigating authorities with the necessary flexibility to respond to changes in these non-market economies. Indeed, it appears from the challenged antidumping investigation that the EU recognizes a certain degree of market reform in the Chinese economy given that *all* the cooperating Chinese companies that requested IT/individual margins received them.[12]

11. For all these reasons, an investigating authority may apply criteria to determine whether an individual company is an exporter or producer without acting inconsistently with Article 6.10 of the AD Agreement.

B. Article 9 of the AD Agreement Does Not Preclude an Investigating Authority from Imposing or Applying a Single Antidumping Duty to Imports from a Group of Companies

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[9] *See Protocol of 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.").

[10] China argues that Article 15 of the Protocol provides for a "derogation" only from the rules for determining normal value and does not provide for any derogation from the purported rule of calculating individual dumping margins. *See* China First Written Submission, para. 48. As explained above, determining which exporter or producer is examined does not constitute a derogation from any rule in the covered agreements. Instead, it is a condition precedent to calculating an individual margin.

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

[12] *See* EU First Written Submission, para. 205.

12. China argues that Article 9(5) of the Basic AD Regulation is inconsistent with Articles 9.2, 9.3, and 9.4 of the AD Agreement because, with respect to those firms that do not qualify for IT, Article 9(5) prevents the Commission from imposing or applying an individual antidumping duty for each exporter or producer that was part of the sample or provided the necessary information to the investigating authority.[13] The United States submits that China's argument is premised on misunderstandings of Article 9 of the AD Agreement, and that China's interpretation of Article 9 does not necessarily result in the obligation for which China argues.

13. 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.[14] In this regard, the concept of *imposing* antidumping duties on an individual exporter or producer, as advanced by China, is found nowhere in Article 9 of the AD Agreement.

14. Furthermore, it does not follow from China's interpretation of Article 9 that an investigating authority would necessarily be required to impose or apply an individual antidumping duty for each company. As in the case of its Article 6.10 claim, China fails to recognize that the decision as to whether a group of companies functions as a single entity is one that an investigating authority must make *before* it can know how duties should be applied to those companies' imports. If it concludes that multiple companies are closely related and function as a single entity, an investigating authority may apply a single duty to all of those companies' imports, even under China's reading of Article 9. Nothing in Article 9 prohibits such treatment; nor does Article 9 set out criteria for an investigating authority to examine before concluding that a particular firm or group of firms constitutes a single entity.

15. In any event, China's claims pursuant to Article 9 of the AD Agreement appear to be dependent on its claims under Article 6.10.[15] For the reasons discussed above, China's arguments pursuant to Article 6.10 of the AD Agreement are based on an incorrect understanding of that provision. As a result, there is no basis to support China's consequential claims under Article 9 of the AD Agreement.

III. Article 9(5) of Council Regulation No. 1225/2009 Does Not Appear to Fall Within the Scope of Article X:3(a) of the GATT 1994

16. Although China's First Written Submission refers to a challenge to "the manner in which the EC administers Article 9(5) of the Basic AD Regulation,"[16] China's panel request indicates

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[13] *See* China First Written Submission, paras. 70 (Article 9.2), 84 (Article 9.3), and 91 (Article 9.4).

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

[15] *See, e.g.,* China First Written Submission, paras. 70 (Article 9.2), 85 (Article 9.3), and 90 (Article 9.4).

[16] China First Written Submission, para. 102.

that its actual claim is that Article 9(5) is inconsistent as such with Article X:3(a) of the GATT 1994.[17] To the extent that China is challenging Article 9(5) under Article X:3(a) of the GATT 1994, the United States submits that this measure does not fall within the scope of Article X:3(a).

17. Article X:3(a) provides that "[e]ach contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article." The obligation in this provision relates to the *administration* of instruments set out in Article X:1. The Appellate Body has recognized that laws and regulations themselves may be challenged under Article X:3(a) *where they reflect the administration* of an instrument set out in Article X:1.[18] Where those laws and regulations do not embody the administration of another instrument, however, they "are not challengeable under Article X:3(a)."[19]

18. Article 9(5) of the Basic AD Regulation does not appear to address the administration of any other legal instrument. Instead, Article 9(5) appears to provide substantive rules on how antidumping duties are to be imposed under certain circumstances. The United States therefore agrees with the EU that, under these circumstances, Article 9(5) itself cannot be found to breach GATT Article X:3(a).[20]

IV. Article 5.4 of the AD Agreement Requires an Investigating Authority To Determine the Existence of Industry Support for an Application Prior to Initiating an Investigation

19. China claims that the EU failed to properly examine whether the industry support thresholds were met before initiating the investigation, as required by Article 5.4 of the AD Agreement.[21]

20. Article 5.4 of the AD Agreement provides, in relevant part:

> An investigation *shall not be initiated ... unless* the authorities have determined, on the basis of an examination of the degree of support for, or opposition to, the application expressed by domestic producers of the like product, that the application has been made by or on behalf of the domestic industry. (Emphasis added)

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[17] *See* Request for the Establishment of a Panel, WT/DS397/3, p. 2.

[18] *See EC – Customs Matters (AB)*, para. 200.

[19] *EC – Customs Matters (AB)*, para. 200.

[20] EU First Written Submission, paras. 182-186.

[21] *See* China First Written Submission, paras. 198-224.

21. While it takes no position on the merits of China's factual allegations, the United States shares China's view that, pursuant to Article 5.4, an investigating authority may not initiate an investigation unless it has conducted an examination of the evidence and determined that the requisite industry support exists. This determination and the underlying examination must take place *prior to* the authority's decision whether to initiate an investigation, and thus must be based on evidence available to the investigating authority prior to initiation. It would be neither consistent with the terms of Article 5.4 nor logical for an investigating authority to take into account facts that are revealed *subsequent to* its initiation decision in order to bolster its examination of the degree of industry support that is required *prior to* initiation.

V. Articles 2.1 and 2.6 of the AD Agreement Do Not Prohibit an Investigating Authority from Defining the "Like Product" To Include Items that Are Not Identical to Each of the Items Comprising the Product Under Consideration

22. China claims that the definition of "like product" employed by the EU is inconsistent with Articles 2.1 and 2.6 of the AD Agreement. In support of this claim, China argues that the EU erred in including "standard fasteners" and "special fasteners" together in the scope of the relevant "like product" in this investigation, despite the EU's recognition that adjustments would be required to reflect the difference between these two types of fasteners.[22]

23. While it takes no position on the merits of China's factual allegations, the United States disagrees with China's understanding of the definition of "like product" in antidumping proceedings.

24. Article 2.6 provides:

> Throughout this Agreement, the term "like product" ("produit similaire") shall be interpreted to mean a product which is identical, *i.e.* alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.

25. The United States notes, first, that as a purely definitional article, Article 2.6 itself imposes no obligation on WTO Members.[23] This provision alone therefore provides no basis for a finding of inconsistency.

26. Second, Article 2.6 calls for a comparison between the "*product* under consideration" and the "like *product*." Within the scope of any "product," however, may exist any number of items, imported or exported as part of the trade in that product, that vary in limited degree from the

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[22] China First Written Submission, paras. 327-331.

[23] See *US – Softwood Lumber Dumping (Panel)*, para. 7.146.

other items. As recognized by the panels in *US – Softwood Lumber AD Final* and *EC – Salmon*, there is no requirement that each *individual* item within the "like product" be "like" each *individual* item within the imported product subject to consideration.[24] Rather, what is required is a comparison of the *overall* scope of the product under consideration with the *overall* scope of the like product.[25]

27. This is confirmed by the context of Article 2.6. For example, Article 6.10 provides that an investigating authority may use sampling where, *inter alia*, the "number of ... types of products involved" is so large as to make individual examination of exporters or producers impracticable. This provision thus expressly acknowledges the possibility of an investigation on one like product that nevertheless covers multiple items within that like product category.

28. The United States also notes that Article 2.4 obliges an investigating authority to account for various differences, including physical differences that affect price comparability, when comparing export price and normal value. Contrary to China's argument, therefore, an investigating authority's determination that differences between certain items (for example, "standard" fasteners and "special" fasteners) are significant enough to be taken into account in product comparisons, does not disqualify such items from being treated by an investigating authority as part of the overall "like product."[26]

VI. Article 3.1 of the AD Agreement Generally Prohibits an Investigating Authority from Excluding from its Examination of the Domestic Industry Those Domestic Producers that Did Not Support the Application and from Evaluating Injury Factors on the Basis of Different Groups of Domestic Firms

29. China argues that the EU acted inconsistently with Article 3.1 of the AD Agreement by (1) excluding domestic producers that did not support the application from its examination of injury,[27] and (2) evaluating injury factors on the basis of different groupings of domestic producers.[28] While it takes no position on the merits of China's factual allegations, the United States agrees with China that, under either of these conditions, an investigating authority fails to undertake an "objective examination" of the impact of dumped imports on the domestic industry as required by Article 3.1 of the AD Agreement.

30. Article 3.1 provides:

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[24] *See US – Softwood Lumber Dumping (Panel)*, para. 7.157; *EC – Salmon (Panel)*, paras. 7.48-7.56.

[25] *See US – Softwood Lumber Dumping (Panel)*, para. 7.157.

[26] *See* China First Written Submission, paras. 327-331.

[27] *See* China First Written Submission, paras. 241-242.

[28] *See* China First Written Submission, paras. 435-445.

> 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. (Emphasis added.)

As the Appellate Body has recognized, "an 'objective examination' requires that the domestic industry, and the effects of dumped imports, be investigated in an unbiased manner, *without favoring the interests of any interested party, or group of interested parties, in the investigation*."[29]

31. In light of this understanding of Article 3.1, an investigating authority's inclusion of only supportive domestic firms, to the exclusion of other domestic firms, in its examination of the domestic industry appears to show a selection bias *ab initio*. When an investigating authority chooses to investigate data concerning only a portion of the domestic industry, with no objective explanation therefor, it falls short of the requirement in Article 3.1 to conduct an "objective examination" of the state of the domestic industry,[30] particularly where the selected partial data is that chosen by the supporters of the application.[31]

32. Furthermore, where an investigating authority has failed to conduct an "objective examination" as required by Article 3.1, that error permeates the investigating authority's

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[29] *US – Hot-Rolled Steel (AB)*, para. 193 (emphasis added).

[30] *See US – Hot-Rolled Steel (AB)*, para. 204:

> We have already stated that it may be highly pertinent for investigating authorities to examine a domestic industry by part, sector or segment. However, as with all other aspects of the evaluation of the domestic industry, Article 3.1 of the *Anti-Dumping Agreement* requires that such a sectoral examination be conducted in an "objective" manner. In our view, this requirement means that, where investigating authorities undertake an examination of one part of a domestic industry, they should, in principle, examine, in like manner, all of the other parts that make up the industry, as well as examine the industry as a whole. Or, in the alternative, the investigating authorities should provide a satisfactory explanation as to why it is not necessary to examine directly or specifically the other parts of the domestic industry. Different parts of an industry may exhibit quite different economic performance during any given period. Some parts may be performing well, while others are performing poorly. To examine only the poorly performing parts of an industry, even if coupled with an examination of the whole industry, may give a misleading impression of the data relating to the industry as a whole, and may overlook positive developments in other parts of the industry. Such an examination may result in highlighting the negative data in the poorly performing part, without drawing attention to the positive data in other parts of the industry. We note that the reverse may also be true – to examine only the parts of an industry which are performing well may lead to overlooking the significance of deteriorating performance in other parts of the industry.

[31] *See, e.g., Mexico – Rice (AB)*, paras. 180-181; *Mexico – Rice (Panel)*, para. 7.86.

analyses of market share, price effects, impact, and causation under Articles 3.2, 3.4, and 3.5, respectively. These additional errors are a consequence of the fact that, instead of conducting these analyses in relation to an objectively-determined "domestic industry," the investigating authority analyzed these elements solely by reference to those members of the domestic industry that supported the antidumping application.[32]

33. Similarly, once an investigating authority defines which entities comprise the "domestic industry" that will form the basis for its injury analysis, an "objective examination" requires that the authority seek and, to the extent possible, use a consistent data set reflecting the performance of those entities.[33] The United States recognizes that an investigating authority may be confronted with unreliable or incomplete data furnished by one or more domestic producers. In such situations, if the investigating authority does not receive complete and accurate information through supplementary requests, or resort to a reasonable estimation methodology that will yield results that are reflective of the state of the domestic industry, the investigating authority should, at the very least, provide an explanation as to why it must examine injury factors on the basis of different groupings of domestic producers. Without such an explanation, it could appear that the investigating authority did not conduct an objective examination based on positive evidence as required by Article 3.1, but instead selectively chose data to show injury where it may not exist.

VII. China's Claims Under Article 6 of the AD Agreement

34. China claims that the EU violated certain disclosure and procedural requirements found in Article 6 of the AD Agreement.[34] While it takes no position on the merits of China's factual allegations, the United States respectfully requests the Panel to take into account the following general points in assessing the claims of China under Article 6 of the AD Agreement.

A. Article 6.2 and 6.4

35. The United States agrees with China that transparency and procedural fairness are key principles of the AD Agreement. Failure to ensure transparency and procedural fairness could prevent an interested party from being able to meaningfully defend its interests.

36. For example, Article 6.4 of the AD Agreement provides:

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[32] In this respect, the United States recalls that the analyses set out in Articles 3.2, 3.4 and 3.5 all form part of the determination as to whether there is material injury to the *domestic industry*. *See* Footnote 9 to the AD Agreement. The United States also notes that, in *Mexico – Olive Oil*, the panel discussed the overarching importance of the domestic industry definition to various aspects of the injury determination in Article 15 of the SCM Agreement, which provisions parallel those of Article 3 of the AD Agreement. *See Mexico – Olive Oil*, paras. 7.197-7.201.

[33] *See Mexico – Pipe and Tube AD*, paras. 7.326-7.328.

[34] China First Written Submission, paras. 527-609, 617-631.

> The authorities shall whenever practicable provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases, that is not confidential as defined in paragraph 5, and that is used by the authorities in an anti-dumping investigation, and to prepare presentations on the basis of this information.

The Appellate Body has recognized that the "relevancy" of the information covered by Article 6.4 is to be determined from the perspective of the interested party, not the investigating authority.[35] The United States therefore agrees with China that Article 6.4 generally requires that an investigating authority give interested parties access to all non-confidential information that is submitted during an investigation.[36] Failure to provide such access would not only be inconsistent with Article 6.4, but also Article 6.2, because without access to information described in Article 6.4, an interested party is necessarily denied "a full opportunity for the defense of their interests."[37]

37. In an antidumping investigation, the ability of an interested party to defend its interests is especially critical with respect to information related to the calculation of normal value and the price comparisons that are conducted. These elements are the heart of the antidumping analysis, and the failure of an investigating authority to provide a means by which interested parties have access to the information forming the basis of these elements raises considerable hurdles to the ability of such parties to defend their interests as provided by Article 6.2. Indeed, the United States agrees with China that where such information is not disclosed, and the interested parties are therefore not able to see relevant information, those parties may be denied a full opportunity to defend their interests as required by Article 6.2 of the AD Agreement.[38]

B. Article 6.5

38. China also raises a claim with respect to Article 6.5 of the AD Agreement, which requires that information which is by nature confidential, or which is provided on a confidential basis by parties to an investigation, shall be treated as such by the investigating authorities upon a showing of good cause. China claims that the Commission combined its analysis of the MET claims of Chinese producers into one document that was released to all interested parties, as a result of which the Commission improperly disclosed confidential information to parties other than those that had submitted such information.[39] While it takes no position on the merits of China's factual allegation, the United States agrees with China that, where an investigating authority accepts information being submitted as confidential, the authority's failure to so treat

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[35] *See EC – Pipe Fittings (AB)*, para. 146.

[36] China First Written Submission, para. 546-593.

[37] *See EC – Pipe Fittings (AB)*, para. 149.

[38] China First Written Submission, para. 532.

[39] China First Written Submission, paras. 617-619.

that information, in particular by disclosing it to interested parties other than each of the exporting producers that furnished the information, is inconsistent with Article 6.5 of the AD Agreement.

C. Article 6.1.1

39. Finally, China claims that the EU acted inconsistently with Article 6.1.1 of the AD Agreement by providing less than 30 days for interested parties to submit responses to MET and IT claim forms. The United States agrees with the EU that China's claim is premised on a fundamental misunderstanding of the scope of Article 6.1.1.[40]

40. 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 appears to assume that the term "questionnaires" in Article 6.1.1 encompasses *any* request 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.[41]

41. However, as the panel in *Egypt – Rebar* explained,[42] 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.

42. 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.

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[40] *See* EU First Written Submission, para. 783.

[41] *See* China First Written Submission, para. 627.

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

43. The opportunity provided by an investigating authority to permit Chinese companies to claim market economy treatment or individual treatment 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.

44. The United States notes that, notwithstanding the Article 6.1.1 claim advanced by China in this dispute, at least China's 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. 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.[43] In an ongoing CVD investigation on Grain-Oriented Electrical Steel (GOES) from the United States, the Chinese Bureau of Fair Trade for Imports and Exports (BOFT) has 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, attached at Exhibit US-1, did China provide an initial period of 30 days to respond.

VIII. Conclusion

45. The United States thanks the Panel for providing an opportunity to comment on the issues in this proceeding, and hopes that its comments will prove to be useful.

[43] 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)