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

(WT/DS397)

Executive Summary of the U.S. Oral Statement at the Third Party Session of the First Substantive Meeting of the Panel with the Parties

April 1, 2010

1. The U.S. oral statement will focus on the following three issues: (1) the identification of the relevant "producers" or "exporters" under Article 6.10 of the AD Agreement; (2) the identification of the"like product" as defined in Article 2.6 of the AD Agreement; and (3) the identification of the "domestic industry" under Article 4.1 of the AD Agreement.

"Producers" and "Exporters" Entitled to an Individual Margin of Dumping

2. One of China's principal claims is that Article 9(5) of the EU's Basic AD Regulation violates the covered agreements by requiring the investigating authority to apply a single dumping margin to multiple firms unless certain conditions are met. According to China, Article 6.10 of the AD Agreement permits application of a single dumping margin to multiple exporters or producers only where the number of producers and exporters makes impracticable the application of individual dumping margins for specific exporters or producers. China argues that because Article 9(5) does not fit into this narrow exception, it is inconsistent with Article 6.10.

3. The EU responds that China's argument fails because limiting the exporters or producers examined due to their large number is not the *only* exception to the general requirement of an individual margin contained in the first sentence of Article 6.10. According to the EU, Article 6.10 permits application of a single margin of dumping to multiple firms depending on the economic realities of those firms.

4. The United States agrees that the economic realities of the firms included in the investigation are key to implementing the obligations in Article 6.10. However, these economic realities do not provide an *additional exception* to Article 6.10. Instead, evaluation of the economic realities of the firms is part of the investigating authority's task in determining the "exporters" and "producers" for which it must generally determine an individual margin.

5. We begin with the text of Article 6.10, which states that: "[t]he authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation." The provision then provides one exception to this rule when the number of exporter or producers is so large as to make such a determination impracticable. As this provision makes clear, investigating authorities are generally required to determine an individual margin of dumping for each known exporter or producer. Thus, a fundamental question an investigating authority must answer when fulfilling this requirement is what "exporters" or "producers" are included in the investigation. Put differently, Article 6.10 establishes that the identification of the specific producers or exporters in an investigation is a *condition precedent* to calculating a dumping margin.

6. The United States recalls that the AD Agreement does not define an "exporter" or "producer," nor does it establish criteria for an investigating authority to evaluate when making this determination. As other Members have recognized, one particularly meaningful criterion in this inquiry is the economic realities of the firms included in the investigation, including their structure and operations in the particular economy at issue. For example, if a firm included in the investigation has a parent company that controls fundamental business decisions such as those related to production and pricing for the firm included in the investigation, then it may be appropriate to consider that firm and its parent company as a single exporter or producer.

7. Under such circumstances, it would not make sense to assign the firm and its parent company separate margins of dumping because, as the EU points out, such a close relationship would permit the related exporters or producers to channel exports through an affiliate with a lower dumping margin, thereby significantly undermining the effectiveness of antidumping measures. Nothing in Article 6.10 of the AD Agreement requires such a result.

8. The panel's reasoning in *Korea – Paper* fully supports this understanding of Article 6.10:

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

9. The United States respectfully submits that, consistent with this reasoning, this Panel should find that nothing in Article 6.10 prohibits an investigating authority from treating multiple firms as one exporter or producer if the facts demonstrate that the firms are sufficiently close that such treatment is appropriate. To the extent that Article 9(5) of the EU Basic AD Regulation is a mechanism for the investigating authority to examine such a close relationship between firms, that mechanism would not appear to be inconsistent with Article 6.10. Rather, such a mechanism would be critical to assist the investigating authority in complying with the general rule in Article 6.10 to calculate a single margin of dumping for every known exporter or producer.

10. The United States would also like to address China's assertion that Article 9(5) unfairly singles out firms from non-market economies for further analysis before these firms can qualify for an individual margin. There is nothing unfair or WTO-inconsistent in an investigating authority analyzing the independence of the firms included in the investigation. As we have just described, Article 6.10 of the AD Agreement does not prohibit an investigating authority from considering the economic realities of a firm when deciding whether the firm on its own qualifies as a "producer" or "exporter" and should therefore receive an individual margin. These economic realities necessarily include *the kind of economy in which the firm operates*.

11. Among the distinguishing features of a non-market economy is that the role of the government distorts the functioning of market principles. As the EU has pointed out, there is no shortage of evidence of the Chinese government intervening in the Chinese economy. Indeed, the fact that WTO Members have recognized the pervasiveness of government interference in the Chinese economy is reflected in both China's Protocol of Accession and Working Party Report.

12. Such interference can result in the government exerting influence over companies,

including decisions related to production and pricing. As we have discussed, a lack of independence in production or pricing decisions is an important factor in determining whether a firm constitutes an "exporter" or "producer" for which an individual margin of dumping must be calculated pursuant to Article 6.10. Thus, firms in non-market economies operate under economic realities that make it particularly important for an investigating authority to analyze closely the particular structures and operations of these firms to evaluate their independence.

13. China is also incorrect in suggesting that companies from non-market economies face a heavy burden to demonstrate that they qualify for individual margin results. This so-called burden could be easily discharged, for example, by providing the investigating authority with evidence of a firm's structure and operations that would demonstrate that it functions as an exporter or producer separate from the government. Permitting firms to demonstrate independence also allows investigating authorities to make such evaluations on the basis of the facts in a given investigation and thereby respond to economic changes that occur over time in these non-market economies. Indeed, the investigation at issue in this dispute appears to reflect precisely that type of flexible response to such changes in the Chinese economy, given that *all* the cooperating Chinese companies that requested individual margins received them.

"Like Product"

14. China argues that "standard" fasteners and "special" fasteners are significantly different from each other. In its view, most fasteners from China were of the "standard" variety, whereas the EU had included "special" fasteners within the scope of the "like product." According to China, this failure of the EU to appreciate the distinction between "standard" fasteners and "special" fasteners when identifying the "like product" in this investigation was inconsistent with Articles 2.1 and 2.6 of the AD Agreement. This argument, however, fundamentally misunderstands the nature of the "like product" determination.

15. First, China appears to consider that the mere fact that both "standard" and "special" fasteners were included within the EU's "like product" evidences a violation of Article 2.6 because these two types of fasteners are themselves not "like" each other. In its third party submission, Norway similarly argues that Article 2.6 "requires that *any* given category of the 'like product' must be 'like' *each and every* category of the product under consideration."

16. This is an incorrect understanding of Article 2.6. That provision defines a "like product" to be "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." (Emphasis added) The requirement of "likeness" is therefore determined at the level of the *product*, by comparing the specific product under consideration with another product. Nothing in the AD Agreement requires an investigating authority to make a determination at a more micro level, namely, by examining the "likeness" of models or categories within that particular product.

17. To the contrary, Article 2.4 specifically contemplates that meaningful "differences which

affect price comparability" may exist among models within a single product definition. It is in this respect that the EU appears to have recognized the differences between "standard" and "special" fasteners.

18. Ultimately, what China appears to be complaining about is that the EU considered "fasteners" – including "standard" *and* "special" fasteners – to be the "product under consideration" or, in the words of Article 2.1, "the product exported." By characterizing this action as a failure to identify the "like product" properly, China confuses the "product under consideration" with the "like product". These two concepts, however, are distinct under the AD Agreement. Article 2.6 of the AD Agreement provides a definition of "like product," which contemplates that an investigating authority will evaluate the "likeness" of a given product by reference to the "product under consideration" that has already been identified. In contrast, as multiple panels have recognized, the AD Agreement imposes no definition or specific obligation in respect of the identification of the "product under consideration." The AD Agreement therefore provides no textual basis for China's complaint about the EU's selection of the "product under consideration."

"Domestic Industry"

19. China claims that the EU violated Articles 3.1 and 4.1 of the AD Agreement by excluding from the definition of the domestic industry all companies that did not make themselves known within 15 days of the date of publication of the notice of initiation, as well as those companies that did not support the investigation. Although the United States takes no position on the merits of China's factual allegations, the United States explained in its written submission why it agreed with China that a biased exclusion of certain producers from the injury examination would violate Article 3.1. That is, by fashioning an investigation so as to exclude all companies that did not support the investigation, 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. The United States will focus now on how the deliberate exclusion of such producers from the "domestic industry" is also inconsistent with Article 4.1.

20. A proper definition of the domestic industry in accordance with Article 4.1 is essential to ensure that the investigating authority's examination under Articles 3.2, 3.4, and 3.5 addresses the impact of dumped imports on the appropriate set of domestic producers. Indeed, if an investigating authority fails to define the domestic industry consistently with Article 4.1, its consideration under Article 3.4 of the relevant economic factors having a bearing on the "domestic industry," and its examination under Article 3.5 of a causal link between dumped imports and injury to the "domestic industry," will be fatally flawed from the outset.

21. Article 4.1 obliges an investigating authority to define the domestic industry as "the domestic producers as a whole of the like products or ... those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products." This provision is subject to two exceptions that do not apply here, but, as we will discuss, these exceptions illustrate why it is inconsistent with this provision to selectively exclude a group of

domestic producers from the "domestic industry".

22. The EU appears to argue that, by virtue of the "major proportion" language, an investigating authority has virtually unfettered discretion to exclude whichever producers it wishes, as long as the remaining producers represent a "major proportion" of the industry's production. The EU's unduly narrow reading is not supported by the text.

23. First, the United States notes that the term "major proportion" is not simply a *quantitative* criterion indicating that an investigating authority need only include a certain *number* of producers in its "domestic industry." As the panel in *Argentina – Poultry* recognized, the word "major" as used in Article 4.1 is not a fixed percentage benchmark, but instead refers to producers of "an important, serious or significant" proportion of total domestic production. The text of Article 4.1 indicates that the "importance" of this proportion could be examined not only by reference to quantity of output. For example, Article 4.1(i) allows for an exception from the "major proportion" requirement in situations where "related" producers have been excluded. By focusing on the nature of the relationship between producers, this sub-paragraph indicates a *qualitative* element that may be considered when evaluating whether a "major proportion" of the industry has been included.

24. Second, one of the relevant qualitative factors is the extent to which the firms that an investigating authority seeks to exclude from the "major proportion" are themselves a distinct category of producers. As already noted above, Article 4.1(i) explicitly authorizes the exclusion of "related" producers from the "domestic industry." Similarly, Article 4.1(ii) sets out the only circumstances where an investigating authority may focus its definition of "domestic industry" on the extent to which a *certain defined group* of producers is uniquely injured, which is by virtue of the geographic concentration of imports and of domestic shipments. The language of Article 4.1 thus reveals that the only categories of producers that may be entirely excluded from the domestic industry as a category are "related" producers and those falling under the regional industry exception. As the *EC – Salmon* panel noted, "[N]othing 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."

25. By spelling out the narrow exceptions in sub-paragraphs (i) and (ii), Article 4.1 ensures the inclusion of domestic producers from various segments and sectors of the industry in an unbiased manner. An approach to interpreting "major proportion" that allows an investigating authority to exclude from the "domestic industry" a defined group of producers that does not meet the conditions in sub-paragraph (i) or (ii), would appear to be inconsistent with the limited exceptions spelled out in Article 4.1.

26. The United States submits that, when viewed in this light, a domestic industry definition that is framed to exclude all or virtually all non-petitioning and non-supporting producers does not represent an important, significant, or serious proportion of domestic production.