EUROPEAN UNION – ANTI-DUMPING MEASURES ON CERTAIN FOOTWEAR FROM CHINA

(WT/DS405)

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

November 16, 2010

1. While the United States is not discussing today all of the issues that it addressed in its written submission, the Panel should not interpret this as an indication that the United States considers those issues to be unimportant. Indeed, even though the United States will not be discussing today most of China's procedural claims, the United States would like to use this opportunity to reiterate its appreciation of China's acknowledgment in its first written submission of the importance of due process and transparency in trade remedy proceedings. The United States trusts that China will demonstrate these in its administration of its own trade remedy laws.

2. One of China's principal claims in this dispute is that Article 9(5) of the EU's Basic AD Regulation is inconsistent with provisions of various covered agreements because Article 9(5) requires the investigating authority to apply a single dumping margin to multiple firms unless certain conditions are met. China argues that 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 is so large as to make impracticable the application of individual dumping margins for specific exporters or producers and, because Article 9(5) of the Basic AD Regulation 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 of the AD Agreement. However, as we will explain, these economic realities do not provide an *additional exception* to the first sentence of Article 6.10. Instead, evaluation of the economic realities of the firms included in the investigation is part of the investigating authority's task in determining the "exporters" and "producers" for which it must generally determine an individual margin.

5. Article 6.10, first sentence, 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 exporters or producers is so large as to make such a determination impracticable.

6. However, a fundamental question an investigating authority must answer when fulfilling the requirement of the first sentence of Article 6.10 is which "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. This question must be addressed in all antidumping proceedings, both those involving market economies and those involving non-market economies.

7. The United States recalls that the AD Agreement does not define what constitutes an "exporter" or "producer," nor does it establish criteria for an investigating authority to evaluate when making this determination. As the United States and other Members in this dispute 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.

8. Under such circumstances, it would not make sense to assign the firm and its parent company separate margins of dumping because 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 the rule established in Article 6.10 of the AD Agreement requires such a result.

9. The panel's reasoning in *Korea – Paper* fully supports the understanding of the United States and other Members regarding Article 6.10. Consistent with this reasoning, the 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. Furthermore, 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. Before leaving this discussion of Article 6.10 of the AD Agreement, the United States would like to address China's suggestion that Article 9(5) of the Basic AD Regulation inappropriately imposes "extra" conditions that have to be satisfied before firms in non-market economies can qualify for an individual margin. 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 and, in a non-market economy situation, the degree of a firm's independence from the government.

11. Among the distinguishing features of a non-market economy is that the role of the government distorts the functioning of market principles. That such distortion exists in the Chinese economy is well understood. 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 influence on the Chinese economy is reflected in both China's Protocol of Accession and its Working Party Report.

12. Thus, in a non-market economy, the government can exert influence over companies, which can include the government making decisions related to production and pricing for the

firm included in the investigation. 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 of the AD Agreement. Thus, firms in non-market economies such as China operate under economic realities that make it particularly important for an investigating authority to analyze more closely the particular structures and operations of these firms to evaluate their independence.

13. According to China, the EU acted inconsistently with Article 2.4 of the AD Agreement because the analogue country selection procedure and the selection of Brazil as the analogue country precluded a fair comparison between export price and normal value. China argues that the first sentence of Article 2.4 sets out the "overarching principle or 'generic rule' that a fair comparison shall be made between the export price and the normal value." China further argues that this fair comparison requirement should guide the standard by which investigating authorities select an analogue country. Thus, according to China, "an improper analogue country selection procedure leading to the selection of an unsuitable/inappropriate analogue country . . . directly precludes a fair comparison within the meaning of Article 2.4 ... ."

14. The EU responds that Article 2.4 does not apply to the selection of the analogue country because the purpose of such selection is to find a normal value that is comparable with the export price and only once a normal value has been identified does the fair comparison obligation stated in Article 2.4 come into play. According to the EU, "the 'fair value' rule in paragraph 4 does not apply to the choice of the normal value . . ." but, rather, that the "standard process of finding the normal value is set out" in Articles 2.1 and 2.2.

15. The United States agrees that Article 2.4 does not apply to the selection of an analogue country. Contrary to China's assertions, Article 2.4 does not impose an "overarching principle" of fair comparison in the selection of an analogue country. Nor does it guide the standard by which an analogue country is selected. Instead, the focus of Article 2.4 is on how the authorities are to select specific transactions for comparison and make the appropriate adjustments for differences that affect price comparability once the method for determining normal value has been selected. The general obligation to make a "fair comparison" in the first sentence of Article 2.4 cannot be divorced from the remainder of Article 2.4, which exemplifies the types of adjustments that an authority is obliged to make in pursuit of price comparability.

16. As noted by the EU, the purpose of selecting an analogue country is "to find a normal value that can be placed in comparison with the export price." In a market economy proceeding, an authority would apply the rules in Articles 2.1 and 2.2 of the AD Agreement in selecting the home market, a third country market or cost of production as the method for determining normal value. When dealing with a non-market economy, the selection of an analogue country substitutes for the choice between home market, third country market or cost of production in a market economy proceeding. Just as nothing in the text of Articles 2.1, 2.2 or 2.4 indicates that the first sentence of Article 2.4 is relevant to the choice between home market, third country market or cost of production, nothing in paragraph 15(a)(ii) of the Protocol or Article 2.4

suggests that the first sentence of Article 2.4 is relevant to the selection of the analogue country.

17. In summary, an authority uses the analogue country selection procedure to select the basis on which normal value will be determined. While Article 2.4 addresses how the export price and normal value will be *compared* and the obligation to make adjustments for differences that affect price comparability, it does not govern the basis on which normal value is determined. Thus, the obligation under Article 2.4 to ensure a fair comparison between normal value and export price does not apply to the selection of an analogue country.

18. China has asserted that the provisions of Article 3 of the AD Agreement apply to expiry reviews (also referred to as "sunset" reviews) conducted under Article 11.3 of the AD Agreement. The EU responds – correctly in our view – that China's argument is in legal error because the relevant provision setting forth the disciplines relevant to the expiry review at issue is primarily Article 11.3 of the AD Agreement and not Article 3. As the EU notes, China's arguments are directly contradicted by the Appellate Body report in *US - OCTG from Argentina*.

19. As the United States explained in its written submission, the specific requirements imposed by Article 3 of the AD Agreement for original investigations do not apply to sunset reviews under Article 11.3. The Appellate Body has explained this on two occasions, noting that the AD Agreement distinguishes between "determinations of injury" addressed in Article 3 and determinations of likelihood of "continuation or recurrence . . . of injury" addressed in Article 11.3. Moreover, turning to the text of the Agreement, Article 11.3 contains no cross-references to Article 3 that would make Article 3 provisions applicable to sunset reviews. Nor does the text of Article 3 mandate that whenever the term "injury" is used in the AD Agreement, a determination of injury pursuant to the provisions of Article 3 is required.

20. We also observe that Colombia's third party submission invites the Panel to consider proposals made in the ongoing Rules Negotiations concerning sunset reviews. We urge the Panel not to do so for at least two reasons. First, there is no basis in customary rules of interpretation of public international law, as reflected in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties*, for considering these proposals, as Colombia noted in its oral statement today. The proposals do not lend guidance to the meaning of the existing provisions of the AD Agreement. Second, the proposals do not reflect any consensus of Members. Instead, they merely reflect the views of some Members as to how the Agreement should be changed. For these reasons, the proposals should not be given any weight.

21. China asserts that the EU acted inconsistently with Article 6.9 because the investigating authority did not allow sufficient time for parties to respond to a supplemental disclosure explaining a new methodology being used to calculate the "lesser duty." The EU responds that this disclosure was not one of essential facts, but disclosed only outcomes or methodologies and, therefore, the provision of Article 6.9 requiring sufficient time to respond is not applicable.

22. The United States agrees with the EU to the extent that the EU asserts that Article 6.9

does not pertain to the disclosure of outcomes or methodologies by the investigating authority. Rather, the focus of Article 6.9 is whether there is a disclosure of "essential facts" and, if so, whether the time allotted to interested parties to analyze and comment on the disclosure of such facts was reasonable under the circumstances.

23. In addition, even when Article 6.9 applies, its text does not specify any minimum amount of time that would constitute "sufficient time" for a party to defend its interest. Therefore, what constitutes "sufficient time" for an interested party to defend its interests and respond to an essential facts disclosure will depend on the size, significance, and nature of the disclosure.

24. China claims that the EU acted inconsistently with Article 3.3 of the AD Agreement by cumulating imports from China and Vietnam because the conditions of competition between the imports from China and Vietnam were not equivalent. China's claim is based on the erroneous legal premise that an investigating authority must establish that imports from different countries have similar volume and market share trends in order to demonstrate that cumulation is appropriate in light of the conditions of competition pursuant to Article 3.3.

25. The text of Article 3.3 sets out the only specific requirements for cumulation, and there is no legal basis to impose other requirements for cumulation. These specific requirements are that the dumping margins for the individual countries must be more than *de minimis*, the volume of imports from the individual countries cannot be negligible, and there must be a determination that a cumulative assessment is appropriate in light of conditions of competition between the imported products and between the imported products and the domestic like product. The AD Agreement does not elaborate on the factors to be considered by an authority in making the determination regarding conditions of competition, let alone require that an authority must find the type of identity in trends described by China.

26. In its third party submission, Colombia invites the Panel to identify standards with respect to the criteria that an authority should take into account when considering conditions of competition. We urge the Panel to reject Colombia's invitation. First, we note that Colombia itself acknowledges that Article 3.3 of the AD Agreement does not specify criteria that must be considered under the conditions of competition. Second, to the extent that Colombia is asking the Panel to do more than is necessary to resolve this dispute, we would recall the Appellate Body's admonition in *US – Wool Shirts* that panels and the Appellate Body should not "'make law' by clarifying existing provisions of the *WTO Agreement* outside the context of resolving a particular dispute."

27. Regarding China's claim that the EU authorities acted inconsistently with Article 6.1.1 of the AD Agreement by allowing less than 30 days for interested parties to submit responses to MET and IT claim forms, the United States notes that the panel in *US – AD/CVD Duties on Products from China* recently rejected a similar claim by China under Article 12.1.1 of the SCM Agreement, a provision that is almost identical to Article 6.1.1, at paragraphs 15.15 to 15.37 of the report.