

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

**(WT/DS405)**

**THIRD PARTY SUBMISSION OF  
THE UNITED STATES OF AMERICA**

**October 8, 2010**

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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 and that are presented by arguments made in China’s first written submission. The United States reserves the right to comment on the first written submission of the European Union (“EU”), as well as on other aspects of China’s first written submission, in its statement at the third party session of the Panel.

## **II. China’s Claims Regarding Article 9(5) of Council Regulation No. 1225/2009**

### **A. 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”) of the European Union 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.

#### **1. 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.<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup>

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

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<sup>1</sup> See, e.g., *First Written Submission by the People’s Republic of China*, 20 August 2010, para. 188 (“China First Written Submission”).

<sup>2</sup> See, e.g., *China First Written Submission*, para. 189.

<sup>3</sup> See, e.g., *China First Written Submission*, para. 211.

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 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.”

6. The AD Agreement neither defines “exporter” or “producer”, nor sets out criteria for the investigating authority to examine to determine whether a particular entity 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. Depending on the facts of a given situation, an investigating authority may determine that legally distinct companies should be treated as a single “exporter” or “producer” based upon their activities and relationships.

7. 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.<sup>4</sup> 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.”<sup>5</sup> The panel concluded:

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<sup>4</sup> See Panel Report, *Korea – Paper* para. 7.155-7.161.

<sup>5</sup> *Korea – Paper*, para. 7.160. The Appellate Body similarly has 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.

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.<sup>6</sup>

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.

8. The rationale for an investigating authority to treat several companies as one exporter/producer under Article 6.10 can be illustrated by considering a basic example where one parent company wholly owns four subsidiaries. Each subsidiary has a factory manufacturing the product under consideration, and each subsidiary claims entitlement to a separate margin of dumping. Although there are five distinct legal entities, the parent company makes all commercial decisions, including decisions pertaining to production and export of the product under consideration. 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. Potentially, for example, if three of the four manufacturing subsidiaries are found to have dumped and are assigned high cash deposit rates, but the fourth subsidiary does not receive a high rate, the parent company can decide to export all of the merchandise from all four factories through the fourth company, thereby circumventing the antidumping measure. Nothing in Article 6.10 requires such a result.

9. 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. Due to this distortion, prices in a non-market economy cannot be used in antidumping calculations because they do not sufficiently reflect demand conditions or the relative scarcity of resources. In other words, there is an absence of the demand and supply elements that separately and collectively make a market-based price system work.

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<sup>6</sup> Korea – Paper, para. 7.161.

10. 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.<sup>7</sup> Given this evidence of government influence, it would make little sense for an investigating authority to assign an individual dumping margin to an exporting company in China without first confirming, at the very least, that the company functions as an exporter separate from and independent of influence by the government. Otherwise, if the exporter’s prices were set by the government, there would be no reason to assign that company its own dumping margin based solely upon data related to its own pricing. This is because significant and persuasive government influence over the economy, at large, as seen in non-market economy countries such as China, leaves open the potential for the government to exert influence over the export behavior of individual companies, including possible shifting of export activities between production facilities and companies that may be legally distinct, in order to avoid antidumping duties.

11. Such government influence may take the form of, for example, restrictive stipulations associated with a company’s business or export licenses, government approval of export prices, government oversight regarding disposition of profits or financing of losses, and influence over the selection of management. 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.<sup>8</sup>

12. 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 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.<sup>9</sup> 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

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<sup>7</sup> See, e.g., *Working Party Report on Accession of China*, WT/ACC/CHN/49 (1 October 2001), 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).

<sup>8</sup> *Korea – Paper*, para. 7.165.

<sup>9</sup> See *Protocol of the Accession of the People’s Republic of China*, WT/L/432 (23 November 2001), 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.”).

government,. For example, an authority might wish to see 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.<sup>10</sup>

13. 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.

## **2. 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**

14. 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.<sup>11</sup> 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 result in the obligation for which China argues.

15. 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.<sup>12</sup> 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.

16. 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

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<sup>10</sup> China notes that Article 15 of the Protocol provides for a "derogation" only from the determination of normal value. *See* China First Written Submission, para. 183, fn 99. 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.

<sup>11</sup> *See* China First Written Submission, paras. 212 (Article 9.2), 235 (Article 9.3), and 267 (Article 9.4).

<sup>12</sup> *See, e.g.*, Article 9.2 of the AD Agreement ("When an anti-dumping duty is imposed in respect of any *product...*").

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.

17. 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.<sup>13</sup> 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.

**B. 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**

18. China argues that the EU does not administer the provisions of Article 9(5) of Council Regulation No. 1225/2009 in a uniform, impartial and reasonable manner in accordance with Article X:3(a) of the GATT 1994.<sup>14</sup> The United States submits that China’s claim cannot be raised under Article X:3(a) of the GATT 1994, as discussed below.

19. 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.<sup>15</sup> Where those laws and regulations do not embody the administration of another instrument, however, they “are not challengeable under Article X:3(a).”<sup>16</sup>

20. 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).<sup>17</sup>

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<sup>13</sup> See, e.g., China First Written Submission, paras. 220 (Article 9.2), 243 (Article 9.3), and 271 (Article 9.4).

<sup>14</sup> China First Written Submission, para. 296.

<sup>15</sup> See *EC – Customs Matters (AB)*, para. 200.

<sup>16</sup> *EC – Customs Matters (AB)*, para. 200.

<sup>17</sup> Request for a Preliminary Ruling by the European Union, 22 July 2010, paras. 55-61.

## II. China’s Claims Relating to the EU Determinations of Injury and Likelihood of Injury

### A. As the Appellate Body Has Made Clear, the Specific Requirements Imposed by Article 3 of the AD Agreement for Original Investigations Do Not Apply to Sunset Reviews Under Article 11.3

21. China has asserted that the provisions of Article 3 of the AD Agreement apply to so-called sunset reviews under Article 11.3 of the AD Agreement. Article 3 is titled *Determination of Injury*, and contains the provisions governing original antidumping injury determinations. Article 11.3, the so-called sunset provision, provides for the termination of a definitive antidumping duty after five years, “unless the authorities determine . . . that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury.”

22. The Appellate Body has cogently explained on two occasions that the obligations set forth in Article 3 of the AD Agreement do not apply to likelihood-of-injury determinations in sunset reviews conducted under Article 11.3 of the AD Agreement.<sup>18</sup> As the Appellate Body observed, 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.<sup>19</sup> Article 11.3 contains no cross-references to Article 3 that would make Article 3 provisions applicable to sunset reviews. Nor does Article 3 indicate that whenever the term “injury” appears in the AD Agreement, a determination of injury must be made following the provisions of Article 3.

23. As summed up by the Appellate Body in *US – OCTG from Argentina (AB)*:

Given the absence of textual cross-references, and given the different nature and purpose of these two determinations, we are of the view that, for the “review” of a determination of injury that has already been established in accordance with Article 3, Article 11.3 does not require that injury again be determined in accordance with Article 3. We therefore conclude that investigating authorities are not *mandated* to follow the provisions of Article 3 when making a likelihood-of-injury determination.<sup>20</sup>

24. China attempts to parse the unequivocal findings of the Appellate Body on this issue, by citing to statements in the *US – OCTG from Argentina panel* report that, if an investigating authority actually conducts a new original injury determination, that determination is subject to

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<sup>18</sup> *US – OCTG from Argentina (AB)*, para. 285; *US – OCTG from Mexico (AB)*, paras. 151-52.

<sup>19</sup> *US – OCTG from Argentina (AB)*, para. 278; *US – OCTG from Mexico (AB)*, para. 123.

<sup>20</sup> *US – OCTG from Argentina (AB)*, para. 280.

the requirements of Article 3.<sup>21</sup> We emphasize that the Appellate Body did not make a similar finding. Moreover, we further observe that this statement by the *OCTG* panel does not support China’s view that the entirety of an investigating authority’s likelihood-of-injury determination must be conducted in accordance with the provisions of Article 3. Even assuming *arguendo* that a new finding of injury by an investigating authority in the context of a five-year review must comply with Article 3, the findings concerning a likelihood that injury will continue or recur must comply with Article 11.3. No reading of the *OCTG* reports supports the notion that Article 3 would apply to the likelihood of injury determination.

25. Of course, some of the factors and analyses called for by Article 3.1 may be relevant in a sunset review conducted pursuant to Article 11.3. However, as the Appellate Body has found, the necessity of considering such factors or conducting such analyses “in a given case results from the requirement imposed by *Article 11.3*—not Article 3.”<sup>22</sup>

**B. An Investigating Authority Acts Inconsistently with Article 3.1 of the AD Agreement When It Limits the Universe of Domestic Producers from Which It Obtains Information to Complaining Producers**

26. China also claims that the EU acted inconsistently with Article 3.1 of the AD Agreement.<sup>23</sup> While it takes no position on the merits of China’s factual allegations, the United States does maintain that an investigating authority acts inconsistently with Article 3.1 of the AD Agreement when it limits the universe of domestic producers from which it obtains information to complainants for purposes of its examination of injury. If the EU limited the domestic producers it examined in its investigation in this manner, it may not have conducted an “objective examination” of the impact of dumped imports on the domestic industry as required by the AD Agreement.

27. Article 3.1 provides:

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)

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<sup>21</sup> China First Written Submission, paras. 426-427, quoting *US – OCTG from Argentina (Panel)*, paras. 7.273-7.275.

<sup>22</sup> See *US – OCTG from Argentina (AB)*, para. 284 (italics in original). The United States notes that China omits this key language from its own lengthy quotation of paragraph 284. China First Written Submission, para. 426. Unfortunately, this is not the only instance of selective quotation by China.

<sup>23</sup> China First Written Submission, paras. 441, 446-449, and 1070-1076. The U.S. comments in this section are directed at certain aspects of China’s complaint concerning the non-objectivity of a self-selected sample.

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.”<sup>24</sup>

28. Based on this reading of Article 3.1, an investigating authority’s inclusion of only complainant firms in its examination of the domestic industry, particularly when non-complainants have a meaningful presence in the industry, would appear to show an *ab initio* selection bias that favors the domestic industry and does not meet the requirement that the investigating authority conduct an objective examination. The bias inherent in such an approach would permeate many aspects of the investigating authority’s analysis of injury, including market share, price effects, impact, and causation under Articles 3.2, 3.4, and 3.5, respectively, because the analysis would be based solely on those entities that brought the antidumping application. These are often the entities that are most likely to be injured.

29. If an investigating authority automatically excludes the segment of producers that have chosen not to pursue or support an antidumping action from its definition of the domestic industry, it will result in a domestic industry that covers only the segment of producers most likely to be injured. Such inherent bias precludes an “objective examination” of injury as required by Article 3.1.<sup>25</sup>

30. With respect to the definition of the domestic industry by the investigating authority, we note that Article 4.1 of the AD Agreement requires that the domestic industry account for at least a “major proportion” of the production of the like product and does not permit an investigating authority to exclude a portion of the domestic industry that is an “important, serious, or significant” proportion of domestic production.<sup>26</sup> Whether the domestic industry meets these standards must be evaluated not only under by reference to quantitative criteria, but also to qualitative criteria. This would include consideration of whether the firms excluded from the “domestic industry” themselves constitute a distinct category of producers within that industry. Article 4.1 thus reflects a requirement that investigating authorities refrain from intentionally

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<sup>24</sup> *US -Hot Rolled Steel (AB)*, para. 193.

<sup>25</sup> Nevertheless, the United States notes that the AD Agreement does not expressly specify how an authority should collect the data that will enable it to undertake an “objective examination” of injury if the domestic industry contains too many producers for an authority practically to survey each producer. In this respect, the United States disagrees with China’s position that Article 6.10 governs how an authority must select the producers from which it seeks information in an injury investigation. See China First Written Submission, paras. 510-12. The language of Article 6.10, which is quoted in paragraph 4 above, indicates that the provision concerns only how dumping margins are to be calculated. Article 6.10 makes no reference whatsoever to how an authority should select domestic producers to survey for purposes of injury analysis. Thus, it is not surprising that the panel in *EC – Salmon* concluded that “we see no basis to impose the criteria of Article 6.10 on sampling in the context of injury.” *EC – Salmon*, para. 7.132, fn 309. Consequently, any such selection would be governed by the “objective examination” standard of Article 3.1.

<sup>26</sup> *Argentina – Poultry*, para. 7.341.

excluding pre-defined categories of producers from the domestic industry definition, other than those specifically identified in sub-paragraphs (i) and (ii). It consequently would be inconsistent with the definition contained in Article 4.1 of the AD Agreement for an investigating authority to limit the domestic industry for purposes of the injury analysis to complainant producers or to those producers that have expressed support for the petition solely on the basis of the producers' position regarding the antidumping application. A domestic industry 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, especially where the non-petitioning producers comprise a substantial portion of the industry in question. As the Appellate Body observed in *US – Hot Rolled Steel*, "[t]he investigation and examination must focus on the totality of the 'domestic industry' and not simply on one part, sector or segment of the domestic industry."<sup>27</sup>

**C. Article 3.3 of the AD Agreement Does Not Require an Authority to Take Volume and Price Trends into Account in Determining Whether to Engage in a Cumulative Analysis**

31. China claims that there were "important differences between China and Vietnam in import volumes, market shares, and prices" that the EU failed to recognize in its original injury determination.<sup>28</sup> China argues that, in light of these differences, the "conditions of competition" between the imports from China and Vietnam were not equivalent. As a result, China argues, the EU acted inconsistently with Article 3.3 of the AD Agreement by cumulating imports from China and Vietnam.<sup>29</sup>

32. The United States takes no position on China's factual argument that the import volumes and market shares of China and Vietnam followed disparate trends during the period examined by the EU. However, the United States disagrees with the legal premise of China's argument that an 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 between the imported products," as required by Article 3.3.

33. Under Article 3.3, an investigating authority may cumulate imports only if, first, the dumping margins for the individual countries are more than *de minimis*, and second, the volume of imports from the individual countries are not negligible. In addition, the investigating authority must determine that a cumulative assessment is appropriate in light of the conditions of competition both between the imported products and between the imported products and the like domestic product. Given these specific textual prerequisites for cumulation, there is no basis for China's argument that Article 3.3 imposes other unspecified prerequisites for cumulation.

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<sup>27</sup> *US - Hot Rolled Steel*, para. 190.

<sup>28</sup> China First Written Submission, para. 1157.

<sup>29</sup> See China First Written Submission, paras. 1160-66.

34. The panel in *EC – Pipe Fittings* rejected the type of argument now being asserted by China. The panel explained that:

the text of Article 3.3 contains no specific mandatory factors that are *required* elements in the “conditions of competition” analysis. Given that the text of Article 3.3(b) contains no explicit reference to any particular factors or indicators by which to assess the conditions of competition, including, in particular, no explicit reference to import volume trends – let alone identical or similar volume trends – we find no basis for Brazil’s argument and do not consider that an investigating authority is *required* to conduct a country-by-country import volume examination as a precondition for deciding whether or not a cumulative assessment is appropriate within the meaning of the “conditions of competition” element of Article 3.3(b). While a parallel increase or decrease in volume of imports from various sources may well indicate competition among these imports, it will not necessarily do so: products with non-parallel volume trends may also be competing in certain circumstances.<sup>30</sup>

35. While Brazil did not appeal the panel’s finding on this particular issue,<sup>31</sup> the Appellate Body report rejected the proposition that an authority must determine that each country under investigation must have significant increases in import volumes to be eligible for cumulation under Article 3.3. The Appellate Body stated that “[b]y seeking to place additional obligations on investigating authorities beyond those specified in Article 3.3, namely, that investigating authorities first determine *on a country-specific* basis the existence of significant increases in dumped imports, and their potential for causing injury to the domestic industry, Brazil ignores the role of cumulation in ensuring that each of the multiple sources of ‘dumped imports’ that cumulatively contribute to a domestic industry’s material injury be subject to anti-dumping duties.”<sup>32</sup> This reasoning further confirms that Article 3.3 does not require identity in import trends among countries under investigation, as China incorrectly asserts.

#### **D. Article 3.5 of the AD Agreement Does Not Require Use of Any Specific Non-Attribution Analysis**

36. China makes a variety of claims that the EU’s original injury determination was inconsistent with the third sentence of Article 3.5 of the AD Agreement, which states that “[t]he authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these factors must not be attributed to the dumped imports.” The United States takes no position on the factual issues

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<sup>30</sup> *EC – Pipe Fittings (Panel)*, para. 7.253 (emphasis in original).

<sup>31</sup> *EC – Pipe Fittings (AB)*, para. 116 n.122.

<sup>32</sup> *EC – Pipe Fittings (AB)*, para. 117 (emphasis in original).

raised by China’s claims, particularly whether (or if) the EU erroneously assessed factors other than dumped imports as having no injurious impact on the domestic industry.

37. The United States does, however, note its disagreement with China’s characterization of how an authority must perform the analysis required by the third sentence of Article 3.5. Specifically, China states that “[i]t may never be . . . precisely known’ how much impact a given factor has on injury, but the *Anti-Dumping Agreement*, as interpreted by the AB, has squarely placed the burden on investigating authorities to at least make a good-faith estimate.”<sup>33</sup> China thus appears to suggest that an injury authority must attempt to measure the “magnitude” of injury attributable to every known factor causing injury.<sup>34</sup>

38. Any such suggestion is inconsistent with the language of Article 3.5, as well as with the reasoning of the Appellate Body with respect to that language. In the *US – Hot-Rolled Steel* report upon which China relies, the Appellate Body took pains to “emphasize that the particular methods and approaches by which WTO Members choose to carry out” causation analysis “are not prescribed by the *Anti-Dumping Agreement*.”<sup>35</sup> In *EC – Pipe Fittings*, the Appellate Body reiterated that the AD Agreement “does not prescribe the methodology by which an authority must avoid attributing the injuries of other factors to dumped imports.”<sup>36</sup>

39. Article 3, while it requires authorities to examine many quantitative factors in conducting an injury analysis, does not establish any formula(s) for authorities to quantify injury, *per se*. Nor does it require authorities to attempt to measure the magnitude of injury, aside from specifying that an authority must find the injury to be “material.”<sup>37</sup> Because the AD Agreement does not require any quantitative measure of the magnitude of either any overall injury sustained by the domestic industry or the injury caused by dumped imports, it necessarily does not require measures of the magnitude of injury caused by factors other than dumped imports.

40. Thus, there is simply no basis in the text or context of Article 3 of the AD Agreement for the obligation that China would seek to impose that authorities provide a “good-faith estimate” of the magnitude of the injury caused by factors other than dumped imports.

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<sup>33</sup> China First Written Submission, para. 1243.

<sup>34</sup> China First Written Submission, para. 1198. In the experience of the United States, this is something that Chinese authorities most certainly do *not* undertake in performing their own injury analysis. Therefore, the United States is surprised that China is taking a position that is inconsistent with manner in which it applies its own trade remedies laws.

<sup>35</sup> *US – Hot-Rolled Steel (AB)*, para. 224.

<sup>36</sup> *EC – Pipe Fittings (AB)*, para. 189.

<sup>37</sup> See footnote 9 to Article 3 of the AD Agreement.

### **E. Article 6.8 of the AD Agreement Does Not Compel an Authority to Use Facts Available**

41. China claims that the EU acted inconsistently with Article 6.8 of the AD Agreement “by failing to apply facts available . . . when faced with incorrect and misleading information from the sampled European Union producers” in the expiry review.<sup>38</sup> Even assuming *arguendo* that the producers supplied “incorrect and misleading information,” a question on which the United States does not take a position, China’s claim is not supported by the language of Article 6.8.

42. Article 6.8 specifies, in pertinent part, that “[i]n cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes an investigation, preliminary and final determinations, affirmative or negative, *may* be made on the basis of the facts available” (emphasis added). The use of the word “may” in Article 6.8 indicates that, while authorities have the ability to use facts available under appropriate circumstances, they are not required to do so. If Article 6.8 were intended to impose a mandatory obligation on authorities, it would have used the word “shall.” Other provisions of Article 6 of the AD Agreement that provide mandatory obligations on authorities, such as Articles 6.3, 6.4, 6.5, 6.9, 6.10, 6.12, and 6.13, all use the word “shall.”

### **III. China’s Procedural Claims Under Article 6 of the AD Agreement**

43. China claims that the EU violated certain disclosure and procedural requirements found in Article 6 of the AD Agreement.<sup>39</sup> 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.

44. At the outset, however, the United States notes that it is pleased by China’s apparent recognition of the importance of due process and transparency in the administration of trade remedy laws. The United States is heartened in particular by the following statements of China:

- “[A] 20-day delay by investigating authorities in making available the evidence submitted by the domestic producers/any other interested party to all other interested parties is a violation of the requirement of ‘prompt availability’ mentioned in Article 6.1.2 . . . .”<sup>40</sup>
- “Additionally, China considers that the European Union violated Article 6.5 by granting confidential treatment . . . in the absence of good cause shown by these companies.”<sup>41</sup>

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<sup>38</sup> China First Written Submission, para. 776.

<sup>39</sup> China First Written Submission, paras. 527-609, 617-631.

<sup>40</sup> China First Written Submission, para. 642.

<sup>41</sup> China First Written Submission, para. 722.

- “China considers that the obligation to provide ‘good cause’ for confidential treatment cannot be satisfied by an interested party by simply stating the two standard sentences of Article 6.5 ... .”<sup>42</sup>

The United States looks forward to China translating these statements into action in its administration of its trade remedy laws.

#### **A. Article 6.2 and 6.4 and Access to Information**

45. 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.

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

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.<sup>43</sup> 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.<sup>44</sup> 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.”<sup>45</sup>

47. 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

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<sup>42</sup> China First Written Submission, para. 730.

<sup>43</sup> See *EC – Pipe Fittings (AB)*, para. 146.

<sup>44</sup> China First Written Submission, paras. 667, 1260-62.

<sup>45</sup> See *EC – Pipe Fittings (AB)*, para. 149.

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.<sup>46</sup>

**B. The 30-Day Deadline in Article 6.1.1 Applies Only to Initial Antidumping Questionnaires**

48. 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.<sup>47</sup> China’s claim is premised on a fundamental misunderstanding of the scope of Article 6.1.1.

49. 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.<sup>48</sup>

50. However, as the panel in *Egypt – Rebar* explained,<sup>49</sup> 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.

51. 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

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<sup>46</sup> China First Written Submission, paras. 668, 1260-62.

<sup>47</sup> See China First Written Submission, para. 1346.

<sup>48</sup> See China First Written Submission, para. 1351.

<sup>49</sup> See *Egypt – Rebar*, para. 7.276.

Agreement seeks to provide a minimum time period for respondent firms to collect the information needed to be responsive to the investigating authority.

52. 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.

53. The United States notes that, notwithstanding the Article 6.1.1 claim advanced by China in this dispute, China's investigating authorities appear 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 *Agreement on Subsidies and Countervailing Measures* is worded almost identically to Article 6.1.1 of the AD Agreement, setting out the requirement of a minimum 30-day response period to questionnaires in CVD investigations.<sup>50</sup> In a recently completed countervailing duty investigation on grain-oriented electrical steel from the United States, the Chinese investigating authorities 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.

### **C. Article 6.9 Does Not Establish Any Minimum Time Between Final Disclosure and Any Final Comments by Interested Parties**

54. China asserts that the EU acted inconsistently with Article 6.9 of the AD Agreement by providing only three business days for parties to respond to what China refers to as “the Additional Final Disclosure Document” that the EU issued in its original injury investigation.<sup>51</sup> Article 6.9 of the AD Agreement requires an authority, before any final determination is made, to “inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests.”

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<sup>50</sup> 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.)

<sup>51</sup> China First Written Submission, paras. 1381-85.

55. As a panel has previously observed, “Article 6.9 of the AD Agreement does not prescribe the manner in which the authority is to comply with this disclosure obligation.”<sup>52</sup> Article 6.9 clearly does not specify any minimum amount of time that would constitute “sufficient time” for a party to defend its interest. Moreover, when the drafters of the AD Agreement intended to impose minimum time periods in Article 6, they made this intent express.<sup>53</sup>

56. Because Article 6.9 does not specify the manner in which authorities are to make disclosures, individual authorities may use different means to implement the requirements of the provision. Some authorities may make one single, massive disclosure to interested parties. Other authorities may make many disclosures to interested parties during the course of an investigation; as a result, such an authority’s final disclosure may be relatively modest in size and significance.

57. The United States believes that what constitutes a “sufficient time” for an interested party to defend its interests and respond to the disclosure will depend on the size, significance, and nature of the disclosure.<sup>54</sup> For massive single disclosures, a “sufficient time” may require a number of weeks. On the other hand, in a system where an authority makes many disclosures, a “sufficient time” would be considerably shorter, because interested parties would have had several prior opportunities to make written submissions to the authority discussing, *inter alia*, the material released in these disclosures, and because the final disclosure would be of a modest magnitude.<sup>55</sup>

#### **IV. Article 17.6(i) of the AD Agreement Does Not Impose Obligations on WTO Members**

58. China claims the EU acted inconsistently with its obligations under Article 17.6(i) of the AD Agreement.<sup>56</sup> The Panel should reject these claims, because Article 17.6(i) does not impose obligations on WTO Members.

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<sup>52</sup> *Argentina – Floor Tiles*, para. 6.125.

<sup>53</sup> For example, as discussed above, Article 6.1.1 requires that exporters and foreign producers be provided at least 30 days to respond to initial antidumping questionnaires.

<sup>54</sup> This concept is analogous to the one that the Appellate Body articulated in *US – Hot-Rolled Steel* in construing the term “reasonable period” under Article 6.8 of the AD Agreement. The Appellate Body observed that “[t]he word ‘reasonable’ implies a degree of flexibility that involves consideration of all of the circumstances of a particular case. What is ‘reasonable’ in one set of circumstances may prove to be less than ‘reasonable’ in different circumstances.” *Hot-Rolled Steel (AB)*, para. 84.

<sup>55</sup> With respect to the EU antidumping proceedings at issue in this dispute, the United States takes no position on whether the amount of time allowed by the EU for a response to the final disclosure was sufficient under the circumstances.

<sup>56</sup> See *Request for the Establishment of a Panel by China*, WT/DS405/2 (9 April 2010), claims II.2, II.3, II.4, II.5, II.11, II.13, III.5, III.6, and III.20

59. Article 17.6(i) provides as follows:

In examining the matter referred to in paragraph 5:

- (i) in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned ... .

As is clear from the text, Article 17.6(i) is addressed to panels – “the panel shall determine.” To interpret Article 17.6(i) as imposing an obligation on Members is to read into that provision words that are not there, something that may not be done under customary rules of interpretation of public international law.<sup>57</sup>

60. Rather than repeat the arguments of the EU on this issue in its request for a preliminary ruling, the United States will make only one additional point. The United States notes that prior to its report in *US – Hot-Rolled Steel*, which both China and the EU discuss, the Appellate Body addressed this issue in *Thailand – H-Beams* and found that Article 17.6 does not impose obligations on WTO Members. The Appellate Body stated as follows:

Articles 17.5 and 17.6 clarify the powers of review of a panel established under the *Anti-Dumping Agreement*. These provisions place limiting obligations on a panel, with respect to the review of the establishment and evaluation of facts by the investigating authority. Unlike Article 3.1, these provisions do not place obligations on WTO Members.<sup>58</sup>

The Appellate Body could not have been more clear.

## V. Conclusion

61. The United States appreciates this opportunity to comment on the issues in this proceeding, and hopes that its comments will prove to be useful to the Panel.

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<sup>57</sup> *India – Patent Protection (US) (AB)*, para. 45.

<sup>58</sup> *Thailand – H-Beams (AB)*, para. 114 (emphasis added).