

***European Union – Anti-Dumping Measures on
Certain Footwear from China
(DS405)***

**Response of the United States to the Questions from the Panel
to the Third Parties**

November 23, 2010

ALL THIRD PARTIES:

1. *If the AD Agreement can be considered *lex specialis* with respect to the GATT 1994, please explain how a measure found to be consistent with the AD Agreement can still be found to violate Article I of the GATT 1994. In your answer, please address the General Interpretative Note to Annex 1A of the WTO Agreement, and highlight the specific facts of this case that allegedly constitute a violation of Article I, but not a violation of the AD Agreement.*

1. The United States has some difficulty with the premise of the question, which is that the AD Agreement can be considered *lex specialis* with respect to the GATT 1994. In light of Article 1 and Article 18.1 of the AD Agreement, it would seem more accurate to say that Article VI and the AD Agreement apply together insofar as measures against dumping are concerned. The General Interpretative Note to Annex 1A would resolve any conflict between the two, but that is different than saying that the AD Agreement is *lex specialis* with respect to the GATT 1994.

2. With respect to the issue concerning Article I that is raised in this proceeding, the United States believes that the Panel can resolve the issue without having to make pronouncements about the relationship between Article I and the AD Agreement. Instead, the Panel should find that there is no inconsistency with Article I at all. The United States agrees with the European Union that, for purposes of its Article I claim, China has identified the “advantage” under Article 9(5) of the EU Basic Regulation as “the automatic determination of an individual dumping margin and an individual anti-dumping duty for suppliers in all WTO Members, except China and a limited number of other WTO Members.”¹ However, as the European Union notes, this advantage is based on the nature of the suppliers involved, and not on the product itself or its origin. Instead, suppliers who wish to obtain an individual anti-dumping duty must prove that they act independently of the government, because they are in a different situation than suppliers in market economy countries.

3. Paragraph 2 of the Ad Note to Article VI:1 recognizes that different methods may be necessary in dealing with imports from a non-market economy (NME). As such, it provides important context for interpreting Article I, and leads to the conclusion that Article I does not preclude the use of different methodologies to address differences in the economic situations of

¹ EU First Written Submission, para. 143.

Members.

2. *Does the AD Agreement establish a "fairness" standard of general application? If so, what is the textual basis for this standard. Is the concept of "fairness" embodied in every single provision of the AD Agreement?*

4. In the view of the United States, it is not possible, using customary rules of treaty interpretation, to interpret the AD Agreement as containing a fairness standard of general application. To the contrary, Members in negotiating the specific provisions of the AD Agreement presumably were negotiating those rules that they considered to be fair. As a result, to layer a concept of “fairness” on top of every single provision of the AD Agreement would ignore the specific provisions that were agreed and effectively create obligations additional to the express requirements of each provision.

3. *Can Article 17.6(i) of the AD Agreement be interpreted as establishing "indirect" obligations on investigating authorities? In your answer, please refer to prior panel and Appellate Body Reports on this topic, and to any other element that you might consider relevant in interpreting Article 17.6(i).*

5. In this dispute, China argues that an obligation that the treaty text expressly imposes on one entity – a panel – also implicitly imposes an obligation on a completely different entity – the Member imposing an anti-dumping measure. There is no basis for interpreting the AD Agreement in such a manner, which would be contrary to the plain text. Nor has a panel or the Appellate Body endorsed such an approach.

6. The United States does not believe that the obligation that China seeks to create in Article 17.6(i) can fairly be characterized as an “indirect obligation” that can be derived from the text through the application of customary rules of treaty interpretation. Instead, China seeks to revise that text to create an additional obligation. Articles 3.2 and 19.1 of the DSU make it clear, however, that this is not permitted.

4. *The Panel notes China's reference to the Appellate Body Report in US – Hot Rolled Steel² in support of its argument that Article 17.6(i) of the AD Agreement "imposes an obligation" on investigating authorities. Please explain the relevance of the Appellate Body's views to the issues raised by China's claims, taking into consideration the context of the Appellate Body's reference to Article 17.6(i) in US – Hot-Rolled Steel and the facts of the current case.*

7. The references noted by the Panel are to paragraph 56 of the Appellate Body report in *US – Hot-Rolled Steel*, in which the Appellate Body stated as follows:

² China First Written Submission, paras. 100, and 377.

Article 17.6(i) of the *Anti-Dumping Agreement* also states that the panel is to determine, first, whether the investigating authorities' "*establishment* of the facts was proper" and, second, whether the authorities' "*evaluation* of those facts was *unbiased and objective*" (emphasis added). Although the text of Article 17.6(i) is couched in terms of an obligation on *panels* – panels "shall" make these determinations – the provision, at the same time, in effect defines when *investigating authorities* can be considered to have acted inconsistently with the *Anti-Dumping Agreement* in the course of their "establishment" and "evaluation" of the relevant facts. In other words, Article 17.6(i) sets forth the appropriate standard to be applied by *panels* in examining the WTO-consistency of the *investigating authorities'* establishment and evaluation of the facts under other provisions of the *Anti-Dumping Agreement*. Thus, panels must assess if the establishment of the facts by the investigating authorities was *proper* and if the evaluation of those facts by those authorities was *unbiased and objective*. If these broad standards have not been met, a panel must hold the investigating authorities' establishment or evaluation of the facts to be inconsistent with the *Anti-Dumping Agreement*. (Emphasis in original).

8. The quoted passage does not support the conclusion that China seeks to draw from it. The section of the report in which this passage appears is entitled "Article 17.6 of the *Anti-Dumping Agreement* and Article 11 of the DSU: Standard of Review." This section is largely devoted to a discussion of the relationship between Article 17.6 and Article 11. To the extent that the Appellate Body made any "findings" in this section at all, there was no finding that Article 17.6(i) imposes an obligation on investigating authorities, the finding sought by China in this proceeding.

5. *The European Union's arguments suggest that it takes the view that, as a general rule, individual dumping margins must be calculated for foreign producers/exporters that are individually examined, but there is no obligation in the AD Agreement requiring that individual duty rates be imposed for each foreign producer/exporter that is individually examined. Do you take the view that in an investigation involving a market economy exporting country, an investigating authority could calculate individual dumping margins for foreign producers/exporters, but not impose individual duty rates on those producers/exporters? If so, what is the legal basis for this view?*

9. The United States cannot provide a response to this question because it does not accept the underlying premise that duties are imposed on producers/exporters.

10. Article 6.10 requires that an investigating authority normally determine an individual margin of dumping for each exporter or producer.³ However, the text of Article 9 does not call

³ Article 6.10 provides that "The authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation."

for the imposition of anti-dumping *margins* on *exporters or producers*. Rather, Article 9.2 specifically states that “an anti-dumping *duty* is imposed in respect to any *product*.” Thus, there may be some connection between the anti-dumping duty margins calculated for each examined exporter or producer and the anti-dumping duties imposed on a product, but the correlation is not a one-to-one relationship. For example, an investigating authority may calculate an individual margin of dumping, but may decide to impose the duty on the product by assessing the duty on an ad valorem or per unit basis.

11. Nonetheless, the AD Agreement does contain obligations linking the duties imposed to the individual margins generally required by the first sentence of Article 6.10, or to those individual margins determined under the second sentence of that provision. For example, Article 9.3 of the AD Agreement establishes that the amount of an anti-dumping duty shall not exceed the margin established under Article 2.⁴ Similarly, in respect of exporters or producers not individually examined in situations falling under the second sentence of Article 6.10, Article 9.4(i) limits the amount of a dumping duty to the weighted average margin established with respect to the selected exporters and producers, excluding zero or *de minimis* margins or facts available margins established under Article 6.8. In this regard, Articles 9.3 and 9.4 establish a link between the dumping margins of the individual exporters or producers investigated and the anti-dumping duties collected on the products from those, and possibly other, exporters or producers.

6. *The Panel notes that in Korea – Certain Paper, with respect to the conclusion whether two legally distinct entities should nonetheless be considered a single exporter for purposes of Article 6.10 of the AD Agreement, the panel indicates that the investigating authority must make a decision based on the particular circumstances of the case at hand:*

“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.”⁵

In light of the panel's views, in your view, is it justified to establish a presumption that producers/exporters in a non-market economy are all a "single exporter", and place the burden of proving otherwise on the individual exporting companies, and if so, why? What is the relevance of the particular criteria for demonstrating whether individual exporting companies are independent in this context?

⁴ Although Article 2 itself does not contain a provision relating the dumping margin to the amount of duties collected, the reference to Article 2 in Article 9.3 makes clear that Article 2 sets out how to calculate the margin that serves as the maximum amount of duty imposed or collected

⁵ *Korea – Certain Paper*, para. 7.161.

12. Reflecting the Working Party’s concern regarding “continuing government influence” in China’s economy,⁶ paragraph 15 of China’s Accession Protocol requires that, in an anti-dumping proceeding involving China, an exporter or producer under investigation “clearly show that market economy conditions prevail in the industry producing the like product with regard to the manufacture, production and sale of that product” before the investigating authority must use Chinese prices or costs for determining normal value. In other words, paragraph 15 creates a rebuttable presumption favoring the use of non-Chinese prices or costs. The same concerns regarding the influence of government in China’s economy justify a Member in establishing a presumption that producers and exporters in a non-market economy are all a “single exporter” and in placing the burden of proving otherwise on the individual exporting companies.

7. *What disciplines and/or limits apply to investigating authorities' use of alternative methodologies for establishing the normal value for producers from NME countries? Please specify the legal basis, either in the AD Agreement or elsewhere, for your views in this regard. In your view, does Section 15(a)(ii) of China's Protocol of Accession establish any limits or requirements with respect to the nature and use of a "methodology that is not based on a strict comparison with domestic prices or costs in China" for the purpose of determining normal value of NME producers?*

13. Paragraph 2 to the Ad Note to Article VI:1 of the GATT 1994⁷ and paragraph 15(a) of China’s Protocol of Accession⁸ recognize that an investigating authority conducting an AD

⁶ WT/ACC/CHN/49, para. 44.

⁷ Paragraph 2 provides as follows:

It is recognized that, in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, special difficulties may exist in determining price comparability for the purposes of [Article VI:1], and in such cases importing contracting parties may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate.

⁸ Paragraph 15(a) of China’s Protocol of Accession provides additional rules as follows:

In determining price comparability under Article VI of the GATT 1994 and the Anti-Dumping Agreement, the importing WTO Member shall use either Chinese prices or costs for the industry under investigation or a methodology that is not based on a strict comparison with domestic prices or costs in China based on the following rules:

- (i) If the producers under investigation can clearly show that market economy conditions prevail in the industry producing the like product with regard to the manufacture, production and sale of that product, the importing WTO Member shall use Chinese prices or costs for the industry under investigation in determining price comparability;
- (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

proceeding may need to look beyond the exporting country to find appropriate prices for comparison with prices in the importing country. Neither provision, however, imposes an obligation on Members to use any particular methodology to establish normal value in an anti-dumping proceeding involving imports from an NME country.

8. *In your view, do Articles 2.1 and 2.2 of the AD Agreement provide guidance with respect to the criteria, if any, that should guide the analogue country selection and/or other methodology used to determine the normal value for producers from NME countries? In this connection, please discuss the significance, if any, of the terms "comparable price", "proper comparison", "appropriate" and "representative" as used in Articles 2.1 and 2.2, respectively?*

14. In the view of the United States, neither Article 2.1 nor Article 2.2 provide guidance regarding the selection of an analogue country. Article 2.1 of the AD Agreement, which defines dumping, does not provide guidance with respect to the selection of an analogue country. Additionally, Article 2.2 of the AD Agreement provides rules that an authority would apply in a market economy proceeding in selecting the home market, a third country market or cost of production as the method for determining normal value. The selection of an analogue country to determine the normal value for NME producers substitutes for this choice between home market, third country market or cost of production in a market economy proceeding. Article 2.2 does not address the determination of normal value for producers in a NME proceeding or the use of an analogue country selection procedure on which to base normal value. Accordingly, because Article 2.2 provides specific rules for determining normal value on the basis of costs and prices in the home market, a third country market or cost of production, and it is recognized that an authority “may use a methodology that is not based on a strict comparison with domestic prices or costs in China”⁹, the United States submits that Article 2.2 does not provide guidance with respect to the criteria that should guide the analogue country selection procedure to determine normal value for NME producers.

9. *Please explain whether, in your view, the "fair comparison" requirement in Article 2.4 of the AD Agreement only applies to the subject matter addressed by this provision (i.e., price comparability), or whether this requirement is also applicable to other aspects of an anti-dumping investigation, including, as alleged in this case, the selection of an analogue country in the context of a NME country investigation.*

15. As noted in the U.S. oral statement, the “fair comparison” requirement of Article 2.4 of the AD Agreement does not apply to the selection of an analogue country in the context of a NME proceeding.¹⁰ The selection of an analogue country forms part of the process of

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.

⁹ Paragraph 15(a)(ii) of China’s Accession Protocol.

¹⁰ U.S. Oral Statement, para. 18.

determining normal value in a proceeding involving imports from an NME country. Article 2.4, however, addresses the comparisons and adjustments that an authority must make *after* it has determined normal value and export price. Indeed, Article 2.4 presupposes that export price and normal value have already been determined.

16. Moreover, the language of Article 2.4, which relates solely to the comparison, should not be taken out of context and applied to other issues related to the calculation of dumping margins. The language of the first sentence of Article 2.4, which provides for a fair comparison, must be read in the context of the second sentence, which defines how “this comparison” is to be made. To the extent a comparison has been made in accordance with the rules of Article 2.4, the comparison is “fair.”¹¹ The “fair comparison” requirement of Article 2.4 does not apply to the selection of an analogue country.

10. *Please discuss whether, in your view, it suffices for purposes of Article 2.4 of the AD Agreement that due allowance is made for "differences which affect price comparability", regardless of the basis on which the products under investigation are grouped or categorized for purposes of comparison.*

17. The United States understands this question to be based on China’s claim that the European Union acted inconsistently with Article 2.4 with respect to the product control number methodology used to classify different product types.¹² It is only with this understanding, and without taking a position on the merits of China’s allegations, that the United States responds as follows. Article 2.4 contains a general requirement to make due allowance in each case, on its merits, for differences that affect price comparability as well as an illustrative list of such factors, *e.g.*, conditions and terms of sale, taxation, levels of trade, quantities, and physical characteristics. As such, by making due allowance for differences that are demonstrated to affect price comparability, an investigating authority complies with the obligations under Article 2.4.

18. Moreover, the United States submits that the basis on which the products under investigation are grouped or categorized for purposes of comparison generally would not implicate the provisions under Article 2.4 *per se*. However, if the different product categorizations were demonstrated to affect price comparability, then making “due allowance” for such differences would satisfy an authority’s obligation to account for differences which affect price comparability.

11. *The Panel notes the United States' statement, at paragraph 20 of its oral submission at the meeting of the Panel with third parties, that it agrees with the European Union that China is in legal error in asserting that Article 3 of the AD Agreement applies to expiry reviews. Do you*

¹¹ Further support for this reading of Article 2.4 is found in the first sentence of Article 2.4.2 which refers to “the provisions governing fair comparison in paragraph 4.” This clause clarifies that the entirety of Article 2.4, and not just the first sentence, comprise the provisions of the AD Agreement that deal with “fair comparison.”

¹² *See, e.g.*, China First Written Submission, paras. 403.

agree? If so, what in your view is the consequence of this error for the Panel's disposition of China's claims?

19. As the United States explained in its written submission, the panel and Appellate Body reports in *United States – OCTG from Argentina* and *United States – OCTG from Mexico* explicitly and correctly addressed this issue. Simply put, Article 3 of the AD Agreement does not apply to expiry reviews, which instead are governed by Article 11.3 of the AD Agreement.¹³

20. Insofar as the injury aspects of the EU's expiry review are concerned, China's claims do not reference Article 11.3. China's claim II.2 cites Articles 3.1 and 17.6(i) of the AD Agreement, its claim II.3. cites Articles 3.1, 6.10, and 17.6(i) of the AD Agreement, its claim II.4 cites Articles 3.1, 3.4, and 17.6(I) of the AD Agreement, and its claim II.5 cites Articles 3.1, 3.5, and 17.6(i) of the AD Agreement.¹⁴ As noted above, Article 3 does not provide a basis for challenging the expiry review determination before the Panel. Nor do Articles 6.10 or 17.6 provide a basis for challenging the expiry review determination before the Panel.¹⁵ As a consequence, the Panel should reject these claims.

12. *If an investigating authority, in the course of an expiry review, makes a determination or finding of injury, what effect does that determination or finding have on the determination of the likelihood of continuation or recurrence of injury for purposes of Article 11.3 of the AD Agreement? If the IA has relied upon a determination or finding of injury in reaching its conclusions on the likelihood of continuation or recurrence of injury, and that determination or finding of injury is inconsistent with Article 3 of the AD Agreement, would a reviewing panel necessarily have to find a violation of Article 11.3? Please explain, with particular reference to previous Appellate Body Reports regarding the relationship between Articles 2 and 11.3 of the AD Agreement.*¹⁶

21. The Appellate Body has articulated several requirements that authorities must satisfy in making a likelihood of injury determination in expiry reviews under Article 11.3 of the AD Agreement. Specifically, such a determination must rest on a "sufficient factual basis" that permits the investigating authority to make "reasoned and adequate conclusions." The Appellate Body has further expressed the view that "the fundamental requirement of Article 3.1 that an injury determination be based on 'positive evidence' and an 'objective examination' would be equally relevant to likelihood determinations under Article 11.3."¹⁷

¹³ U.S. Third Party Submission, paras. 21-25.

¹⁴ China First Written Submission, para. 420.

¹⁵ U.S. Third Party Submission, paras. 29, n. 25 (Article 6.10 claims), 58-60 (Article 17.6 claims).

¹⁶ See in particular, Appellate Body Report in *US – Corrosion-Resistant Steel Sunset Review*, para. 127; Appellate Body Report in *US – Anti-dumping Measures on Oil Country Tubular Goods*, para. 181; and Appellate Body Report in *US – Zeroing (Japan)*, para. 183.

¹⁷ Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004, para. 284.

22. An Article 11.3 review is predicated on the existence of an antidumping order,¹⁸ which itself is predicated on findings of dumping and material injury, threat of material injury, or material retardation. In its expiry review determination, an authority may reiterate the injury findings it made in its original determination as a matter of historical background, or to illustrate the conditions of competition that existed during the original period of investigation when dumped imports were present in the marketplace. The United States would not regard reiteration of such historical findings to be the type of “determination or finding of injury” in an expiry review about which the Panel is inquiring.

23. Instead, the Panel’s question appears to concern circumstances in which an authority makes a new determination of whether the domestic industry is presently experiencing material injury as of the time of the expiry review, even though such a finding is not required under Article 11.3. If defects in this new present injury finding are critical to the expiry review and undercut the factual basis underlying the determination of continuation or recurrence of injury, or indicate that such a determination is not based on positive evidence or fails to reflect an objective examination of the evidence, then a panel could properly find the continuation or recurrence of injury determination to be inconsistent with Article 11.3 of the AD Agreement.

24. Nevertheless, the United States emphasizes that not *every* defect in such a new present injury finding would necessarily lead to a finding of an Article 11.3 violation. Again we use the Panel’s example in which an authority makes a new present injury finding, and this finding lacks a sufficient factual basis. Such a deficient finding may undercut a determination of continuation of injury. However, the lack of a basis for finding present injury would not necessarily detract from a determination of recurrence of injury. For example, the antidumping order may have been effective in eliminating the injury caused by the subject imports. Thus, even if there is not a basis for finding that the domestic industry is currently injured, an authority could still properly find that the injury found during the original investigation would likely recur if the antidumping duty order under review were revoked.

25. For this reason, even if Article 3 of the AD Agreement were pertinent to an expiry review – which it is not – an Article 3 violation in the context of a new present injury finding is not dispositive, and may not even be particularly pertinent, to the question of whether an authority has provided a “sufficient factual basis” and “reasoned and adequate explanation” for a determination of *continuation or recurrence* of injury under Article 11.3.

26. Finally, the Appellate Body’s observations concerning the applicability of Article 2 of the AD Agreement to likelihood of dumping determinations under Article 11.3 are based on the language of Article 2 and do not extend more broadly. In *US – Corrosion Resistant Carbon Flat Products from Japan*, the Appellate Body emphasized that “the opening words of Article 2.1 . . . go beyond a cross-reference and indicate that Article 2.1 applies to the entire Anti-Dumping

¹⁸ “Antidumping order” is the term used in U.S. law for a definitive anti-dumping duty.

Agreement.”¹⁹ By contrast, in *US – OCTG from Argentina*, the Appellate Body indicated that while footnote 9 of the AD Agreement concerning injury was a definitional provision that applied to the entire AD Agreement, Article 3 was not definitional and consequently was not applicable throughout the entire Agreement.²⁰ Rather, it stated that there is no “provision of Article 3 [that] indicate[s] that, whenever the term ‘injury’ appears in the Anti-Dumping Agreement, a determination of injury must be made following the provisions of Article 3.”²¹

13. *The Panel notes that Article 11.3 of the AD Agreement contains no guidance with respect to sampling in expiry reviews. Do any provisions of the AD Agreement apply to sampling in the context of an expiry review, and in particular, to sampling in the context of the likelihood of continuation or recurrence of injury aspect of an expiry review? In your answer, please address the lack of any explicit textual guidance with respect to sampling in the context of injury determinations, as discussed by the panel in EC – Salmon (Norway), the relevance of Article 6.10 of the AD Agreement, and Article 11.4 of the AD Agreement, as well as any prior panel or Appellate Body reports deemed relevant.*

27. The AD Agreement has no provision that addresses sampling for purposes of making determinations of continuation or recurrence of injury in expiry reviews. Consequently, decisions investigating authorities make concerning when and whom to sample would be governed by the “objective examination” standard that the Appellate Body has indicated is applicable to determinations of continuation or recurrence of injury under Article 11.3 of the AD Agreement.

28. For purposes of an original injury determination, the AD Agreement similarly does not specify how an authority should collect the data that will enable it to undertake an “objective examination” of injury, as required by Article 3.1 of the AD Agreement, if the domestic industry contains too many producers for an authority practically to survey each producer. As the United States explained in its First Written Submission, this issue is not addressed by Article 6.10 of the AD Agreement, which makes no reference whatsoever to how an authority should select domestic producers to survey for purposes of an injury analysis.²² 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.”²³

¹⁹ Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, adopted 9 January 2004, para. 126.

²⁰ Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004, paras. 276-77.

²¹ Appellate Body Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WT/DS268/AB/R, adopted 17 December 2004, para. 278.

²² U.S. First Written Submission, para. 29, n.25.

²³ Panel Report, *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway*, WT/DS337/R, adopted 15 January 2008, para. 7.132, n. 309.

14. *The Panel notes the European Union's view, at paragraph 498 of its first written submission, that the way in which China raised its claims was "erroneous". Please explain what, in your view, are the consequences of this error, and in particular, the consequences of such an error for the Panel in the disposition of China's claims, assuming it were to agree with the European Union in this respect.*

29. By way of background, the issue to which the Panel refers is the fact that China has claimed that, as a consequence of alleged violations of Articles 2.1, 2.4, 3.1, 3.4, 3.5, 6.10 and 17.6(i) of the AD Agreement, the European Union acted inconsistently with Article 11.3. Referring back to paragraphs 240-245 of its first written submission, the European Union argues that Article 11.3 is the starting point of the legal analysis with respect to expiry reviews, and not a mere consequence of it. The Panel's question essentially asks what it should do in the event that it agrees with the EU argument.

30. As the United States understands it, the EU's position is that China has argued its Article 11.3 claims incorrectly. Furthermore, the premise of the Panel's question is that the Panel agrees with the European Union. That being the case, it would not be appropriate for the Panel to find in China's favor by considering the claims based on reasoning that China perhaps could have, but did not, make. It is true that a panel is not limited by the arguments of the parties, and may consider lines of reasoning that it comes up with on its own. However, in order to find in China's favor on these particular claims, the Panel would have to do more than simply rely on one or two arguments that the parties may not have made. Instead, the Panel would have to reconstruct China's case, effectively making China's case for it. This is something that panels may not do.²⁴

15. *Please comment on the European Union's view that "good cause" for information that is confidential by nature may be shown by "simply placing data of this kind in the appropriate part of the submission". In particular, in your view, would this make Article 6.5 of the AD Agreement unnecessary?*

²⁴ See, e.g., Appellate Body Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R, adopted 19 March 1999, para. 129; Panel Report, *Argentina – Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy*, WT/DS189/R, adopted 5 November 2001, para. 6.6; Panel Report, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, adopted 19 May 2003, para. 7.50; Panel Report, *United States – Definitive Safeguard Measures on Imports of Circular Welded Carbon Quality Line Pipe from Korea*, WT/DS202/R, adopted 8 March 2002, as modified by the Appellate Body Report, WT/DS202/AB/R, para. 6.10-6.11; Panel Report, *United States – Anti-Dumping and Countervailing Measures on Steel Plate from India*, WT/DS206/R and Corr.1, adopted 29 July 2002, para. 7.8; Panel Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/R, adopted 31 August 2004, as modified by the Appellate Body Report, WT/DS264/AB/R, para. 7.13, 7.372; Panel Report, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina – Recourse to Article 21.5 of the DSU by Argentina*, WT/DS268/RW, adopted 11 May 2007, as modified by the Appellate Body Report, WT/DS268/AB/RW, para. 6.10; Panel Report, *European Communities – Countervailing Measures on Dynamic Random Access Memory Chips from Korea*, WT/DS299/R, adopted 3 August 2005, para. 7.7.

31. Article 6.5 of the AD Agreement provides as follows:

Any information which is by nature confidential (for example, because its disclosure would be of significant advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying that information or upon a person from whom that person acquired the information), or which is provided on a confidential basis by parties to the investigation shall, upon good cause shown, be treated as such by the authorities. Such information shall not be disclosed without specific permission of the party submitting it.

32. Consequently, the focus of Article 6.5 is to ensure that authorities maintain the confidentiality of confidential information, and that they do not disclose such information without the permission of the submitter.²⁵ This focus will not be affected by the Panel's disposition of the European Union's argument concerning when there is "good cause" to treat information as confidential. Consequently, acceptance of the EU's view would not render Article 6.5 unnecessary.

33. Indeed, the United States does not perceive that the principal purpose of Article 6.5 is to specify the circumstances under which authorities may treat information as confidential. While the first sentence of the article does provide specific examples of information that is "by nature" confidential, the parenthetical specifying them expressly states that they are exemplary. Nothing in the article purports to set forth comprehensive criteria authorities must use to ascertain whether information is "by nature" confidential.

16. *Please provide your views on the interpretation of the term "good cause" in Article 6.5 of the AD Agreement. In particular, please address the following, referring to any panel or Appellate Body reports you consider relevant:*

- (a) *What is the legal standard that applies to determining what constitutes "good cause" within the meaning of Article 6.5?*
- (b) *Does the "fear for retaliation by customers" suffice to establish good cause for confidential treatment within the meaning of Article 6.5?*
- (c) *How may "good cause" be shown for purposes of Article 6.5? It is your view that an allegation of "good cause" must be substantiated by positive evidence? With respect to information which is by nature confidential, does an indication that information falls into that category suffice to establish "good cause" within the*

²⁵ See Panel Report, *Argentina – Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy*, WT/DS189/R, adopted 5 November 2001, para. 6.33 ("Article 6.5 of the AD Agreement thus requires an investigating authority to treat information which is by its nature confidential or which is provided on a confidential basis as confidential information and prescribes that such information shall not be disclosed without specific permission of the party submitting it.")

meaning of Article 6.5?

- (d) *Who in your view must show "good cause" as provided for in Article 6.5? It is for the submitter of the information for which confidential treatment is sought to establish "good cause" for the granting of such treatment individually? May a showing of good cause be made by a party on behalf of another party or parties? May "good cause" be presumed and/or inferred by investigating authorities on the basis of previous requests for confidential treatment by the same party?*

34. Prior panels that have addressed the issue have found that what constitutes “good cause” for confidential treatment of information under Article 6.5 of the AD Agreement will depend on the particular facts and circumstances of a matter.²⁶ Because of the wide variety of information for which confidential treatment may be requested, and because the text of the AD Agreement does not elaborate on the nature of the “good cause” requirement, we agree with the principle underlying the findings of prior panels that it is neither useful nor appropriate to attempt to articulate a categorical standard concerning what constitutes “good cause.”²⁷

35. Indeed, certain types of documents or information within documents – such as those providing firm-specific data on costs, prices, customer names, production, sales, or income – may be inherently confidential. With respect to such information, there should be no need to require a submitter of information to make an elaborate justification of why there is “good cause” to treat such information as confidential other than to identify the type of information involved. Alternatively, an authority may specifically request such information on the understanding that it is to be “provided on a confidential basis,” as contemplated by Article 6.5. Again, in such instances, the “good cause” for confidential treatment the agency is requesting is demonstrated by the inherently confidential nature of the information.

36. In other instances, the confidential nature of the information a party chooses to submit to the agency will not be inherent. In these circumstances, the party submitting the information will need to provide a particularized explanation of why confidential treatment is warranted for the information submitted.

37. Article 6.5 of the AD Agreement expressly states that information “is by nature confidential” when “its disclosure may have a significantly adverse effect upon the person supplying the information.” Should a submitter assert in good faith that disclosure of information it provides could cause customers to retaliate against it, there may well be sufficient

²⁶ See Panel Report, *Mexico – Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala*, WT/DS331/R, adopted 24 July 2007, para. 7.378; Panel Report, *Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia*, WT/DS312/R, adopted 28 November 2005, para. 7.33.

²⁷ With respect to the reference in the Panel’s question to “positive evidence” – a term that appears in Article 3.1 of the AD Agreement – there is no cross-reference in Article 6.5 or elsewhere in Article 6 to Article 3.1 or the “positive evidence” standard articulated in that provision. Consequently, there is no textual or contextual basis for incorporating Article 3 concepts pertaining to injury investigations into Article 6.

grounds for an authority to conclude that disclosure of the information would cause the submitter substantial competitive harm. In such circumstances, there would be grounds to find “good cause” that the information should be treated as confidential.

17. *Is Article 3.1 of the AD Agreement applicable to the calculation of an injury margin for purposes of the lesser duty analysis? Are there any requirements in the AD Agreement with respect to the calculation of a lesser duty?*

38. Article 9.1 of the AD Agreement provides as follows:

The decision whether or not to impose an antidumping duty in cases where all requirements for the imposition have been fulfilled, and the decision whether the amount of the anti-dumping duty to be imposed shall be the full margin of dumping or less, are decisions to be made by the authorities of the importing Members. It is desirable that the imposition be permissive in the territory of all Members, and that the duty be less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry.

Thus, Article 9.1 does not obligate Members to apply a lesser duty rule. Moreover, for those Members that do apply a lesser duty rule, neither Article 9.1 nor any other provision of the AD Agreement provides any guidance on how to calculate a lesser duty.

39. Additionally, Article 9 does not cross-reference Article 3 of the AD Agreement. Moreover, as discussed above, Article 3 is not definitional in nature. Consequently, there is no textual basis for incorporating requirements specified in Article 3.1 of the AD Agreement for making an injury determination to the application of a methodology that Members are not even obligated to apply.

40. Furthermore, while a lesser duty analysis under Article 9.1 presupposes that an authority has made an affirmative injury determination under Article 3, a lesser duty analysis is not the equivalent of an injury determination. To determine a lesser duty under Article 9.1, an authority will engage in some analysis to calculate what level of duty will serve to “remove the injury.” Article 3, however, addresses a distinct topic: how an authority should determine whether material injury, threat of material injury, or material retardation exist. Article 3 contains no provisions directing an authority to quantify or measure the “amount” of the injury or even providing a basis for calculating the duty level that would eliminate the injurious effects of dumped imports.

18. *The Panel notes the European Union's argument (European Union's first written submission, para. 598) that if a cap cannot be calculated, this does not preclude a determination of the amount of profits under Article 2.2.2 (iii) of the AD Agreement. If a cap cannot be calculated, because there are no "sales of products of the same general category in the domestic market of the country of origin", or if the necessary data cannot be obtained, what, if any, considerations govern the investigating authority in determining profits for purposes of*

constructing a normal value?

41. With respect to the calculation of cost of production, Article 2.2.2(iii) provides that where an investigating authority cannot use the actual amounts incurred and realized in the domestic market for administrative, selling and general costs and profits by the exporter or producer examined and there are no other exporters or producers subject to the investigation, the investigating authority may use “any other reasonable method” to calculate such costs and profit. However, this alternative is subject to a cap on the profit amount “not to exceed the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin.” This provision appears to presume that the information to calculate a profit cap exists in the proceeding.

42. While not commenting upon the particular facts of this dispute, the United States submits that when there is no information allowing the investigating authority to calculate the amount of profit normally realized by exporters or producers, other than the reviewed exporter or producer, in connection with the sale, for consumption in the foreign country, of the merchandise in the same general category, it is reasonable not to quantify a profit cap. Thus, where there is no available information from which to calculate a profit cap, the United States submits that the investigating authority is required to give consideration to the phrase “reasonable method” in Article 2.2.2(iii) for determining the amount for administrative, selling and general costs and profit normally realized.