

***CHINA – DEFINITIVE ANTI-DUMPING DUTIES ON
X-RAY SECURITY INSPECTION EQUIPMENT FROM THE EUROPEAN UNION***

(WT/DS425)

**THIRD PARTY SUBMISSION OF
THE UNITED STATES**

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TABLE OF CASES CITED

Short Title	Full Case Title and Citation
<i>EC – Fasteners (AB)</i>	Appellate Body Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China</i> , WT/DS397/AB/R, adopted 28 July 2011
<i>EC – Salmon (Panel)</i>	Panel Report, <i>European Communities – Anti-Dumping Measure on Farmed Salmon from Norway</i> , WT/DS337/R, adopted 15 January 2008
<i>EC – Pipe Fittings (AB)</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil</i> , WT/DS219/AB/R, adopted 18 August 2003
<i>EC – Pipe Fittings (Panel)</i>	Panel Report, <i>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil</i> , WT/DS219/R, adopted 18 August 2003, as modified by Appellate Body Report WT/DS219/AB/R
<i>Mexico – Rice (AB)</i>	Appellate Body Report, <i>Mexico – Definitive Anti-Dumping Measures on Beef and Rice</i> , WT/DS295/AB, adopted 20 December 2005
<i>Thailand – H-Beams (AB)</i>	Appellate Body Report, <i>Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland</i> , WT/DS122/AB/R, adopted 5 April 2001
<i>Thailand – H-Beams (Panel)</i>	Panel Report, <i>Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland</i> , WT/DS122/R, adopted 5 April 2001, as modified by Appellate Body Report WT/DS122/AB/R
<i>US – Hot-Rolled Steel (AB)</i>	Appellate Body Report, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , WT/DS184/AB/R, adopted 23 August 2001
<i>US – Tyres (AB)</i>	Appellate Body Report, <i>United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China</i> , WT/DS399/AB/, adopted 5 October 2011
<i>US – Oil Country Tubular Goods Sunset Reviews (Article 21.5) (Panel)</i>	Panel Report, <i>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</i> , WT/DS268/RW, adopted 11 May 2007, as modified by Appellate Body Report WT/DS268/AB/RW
<i>US – Softwood Lumber VI (Panel)</i>	Panel Report, <i>United States – Investigation of the International Trade Commission in Softwood Lumber from Canada</i> , WT/DS277/R, adopted 26 April 2004.

I. Introduction

1. In this dispute, the European Union (“EU”) makes claims under various provisions of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the “AD Agreement”). As a third party, the United States is not taking a position on the outcome of the EU claims. However, the United States believes that the proper interpretation of the provisions of the AD Agreement covered by the EU claims is of substantial systemic importance. Accordingly, the United States in this submission addresses its views on the correct legal interpretation of Articles 6.5.1, 6.9, 12.2.2, 3.1, 3.2, 3.4, and 3.5 of the AD Agreement.

II. Procedural and Transparency Requirements of Article 6 of the AD Agreement

2. The EU alleges that China failed to ensure that confidential information provided by interested parties was summarized according to Article 6.5.1 of the AD Agreement. The EU further argues that, in so doing, China also failed to provide a timely opportunity for interested parties to see information relevant to their defense and a full opportunity to defend their interests in contravention of Articles 6.4 and 6.2 of the AD Agreement.¹

3. A basic tenet of the AD Agreement, as reflected in various Article 6 provisions, is that the parties to an investigation must be given a full and fair opportunity to see relevant information and to defend their interests. Thus, Article 6.2 sets forth requirements inherent in a “full opportunity for the defense” of all interested parties’ interests. This includes the opportunity to meet adverse parties, present opposing views, offer rebuttal arguments, and the right to present information orally.

4. Article 6.4 complements the requirements of Article 6.2, by creating the obligation for authorities to provide “timely opportunities” for interested parties to see relevant information and to prepare presentations on the basis of this information. Both Articles 6.2 and 6.4 recognize that, in fulfilling the obligations of these Articles, authorities may need to protect confidential information. Those Articles therefore allow for a limited exception to the disclosure requirements for information that is confidential in nature.

5. Indeed, in anti-dumping investigations, the submission of confidential information is a necessary and frequent occurrence. Article 6.5 thus requires that investigating authorities ensure the confidential treatment of such information. At the same time, Article 6.5.1 balances the need to protect such information against the disclosure requirements of other Article 6 provisions. Thus, Article 6.5.1 provides that an investigating authority, if it accepts confidential information, must provide or otherwise assure that confidential information is summarized in sufficient detail to permit a reasonable understanding of the substance of the information.

6. As the Appellate Body has explained:

¹ See generally EU First Written Submission, paras. 41-82.

Articles 6.5 and 6.5.1 accommodate the concerns of confidentiality, transparency, and due process by protecting information that is by nature confidential or is submitted on a confidential basis and upon “good cause” shown, but establishing an alternative method for communicating its content so as to satisfy the right of other parties to the investigation to obtain a reasonable understanding of the substance of the confidential information, and to defend their interests.²

As a consequence, where the investigating authority accepts confidential information without providing or otherwise assuring timely adequate non-confidential summaries of that information, significant prejudice to the ability of companies and Members to defend their interests could occur.

III. Article 6.9 of the AD Agreement Requires Disclosure of Calculations and Data Used in Determining the Existence of Dumping and in Calculating Dumping Margins

7. The EU alleges that China violated Article 6.9 of the AD Agreement by failing to disclose certain of the essential facts forming the basis for the determination of the dumping margin, including data and calculations which form the basis for the determination of normal value and export prices and the determination of the dumping margin.³

8. Article 6.9 of the AD Agreement requires the investigating authority to disclose to interested parties the “essential facts” forming the basis of the investigating authority's decision to apply anti-dumping duties:

The authorities shall, before a final determination is made, 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.

9. As China observes,⁴ the obligation imposed on the investigating authority by Article 6.9 pertains to the disclosure of “facts”, as opposed to the disclosure of the “reasoning” of the investigating authority.⁵ A “fact” is defined to mean “[a] thing known for certain to have occurred or to be true; a datum of experience” and “[e]vents or circumstances as distinct from

² *EC–Fasteners (China) (AB)*, para. 542.

³ See generally EU First Written Submission, paras. 83-127.

⁴ China First Written Submission, paras. 138-40.

⁵ See, e.g., *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5) (Panel)*, para. 7.148 (“The text of Article 6.9 clarifies that this obligation applies with respect to facts, as opposed to the reasoning of the investigating authorities.”).

their legal interpretation.”⁶ The use of the adjective “essential”, which modifies “facts”, indicates that this obligation does not encompass “any and all” facts, but rather is concerned only with the “essential facts”. The ordinary meaning of “essential” includes “of or pertaining to a thing’s essence” and “absolutely indispensable or necessary”.⁷

10. Moreover, the obligation to disclose “essential facts” encompasses those essential facts “under consideration which form the basis for the decision whether to apply definitive measures”. The term “consideration” has been defined, *inter alia*, as “the action of taking into account”.⁸ Thus, for purposes of the investigating authority’s dumping determination, the essential facts under Article 6.9 are the “indispensable and necessary” facts considered by the investigating authority in determining whether definitive measures are warranted, *i.e.*, whether dumping has occurred and, if so, the magnitude of such dumping.⁹

11. In order to determine whether definitive measures are warranted, an investigating authority must compare a respondent’s normal value to its export price. An affirmative dumping determination is made only if the normal value exceeds the export price, and the margin of dumping is based on the extent to which it does so. This comparison, however, represents merely the final stages of a dumping determination. The investigating authority must first calculate the normal value and the export price.

12. The calculations relied on by an investigating authority to determine the normal value and export prices, as well as the data underlying those calculations, constitute “essential facts” forming the basis of the investigating authority’s imposition of final measures within the meaning of Article 6.9. The calculations and underlying data are facts that are “absolutely indispensable” to the determination of the existence and magnitude of dumping. Without such information, no affirmative determination could be made and no definitive duties could be imposed.

13. Article 6.9 requires that investigating authorities inform interested parties of essential facts under consideration prior to making a final determination of dumping. As Article 6.9 expressly provides, the aim of the requirement is to permit “parties to defend their interests”. The Panel in *EC-Salmon* stated:

We consider that the purpose of disclosure under Article 6.9 is to provide the

⁶ New Shorter Oxford English Dictionary (Clarendon Press, 1993); *see also*, *EC-Salmon (Panel)*, para. 7.805 (“In our view, essential facts to be disclosed under Article 6.9 may qualify under any of these meanings of the word fact.”) (citing these same definitions).

⁷ New Shorter Oxford English Dictionary (Clarendon Press 1993).

⁸ New Shorter Oxford English Dictionary (Clarendon Press 1993).

⁹ The Panel in *EC-Salmon* indicated that essential facts included not only those facts supporting a determination, but encompassed “the body of facts essential to any determination that are being considered in the process of analysis and decision-making by the investigating authority.” *EC-Salmon (Panel)*, para. 7.796.

interested parties with the necessary information to enable them to comment on the completeness and correctness of the facts being considered by the investigating authority, provide additional information or correct perceived errors, and comment on or make arguments as to the proper interpretation of those facts.¹⁰

14. If the interested parties are not provided access to these facts used by the investigating authority on a timely basis, they cannot defend their interests. If, for example, an interested party is not provided the calculations used by the investigating authority to address dumping, or the data underlying those calculations, the interested party cannot review the investigating authority's calculations to determine whether they contain clerical or mathematical errors, or whether the investigating authority actually did what it purported to do. Unless an interested party is provided with these essential facts, it cannot adequately defend its interests.

15. Thus, to the extent that the underlying record reveals that China's investigating authority failed to make available the underlying data and calculations it performed to determine the existence and margin of dumping, including the calculation of the normal value and export price for the respondents, it would have failed to meet its obligations under Article 6.9 of the AD Agreement.

IV. Article 12.2.2 of the AD Agreement Requires Investigating Authorities to Provide Reasons for the Acceptance or Rejection of Claims by Exporters or Importers, Either Through Public Notice or a Separate Report

16. The EU alleges that China violated Article 12.2.2 of the AD Agreement because it failed to set forth sufficiently detailed explanations for definitive determinations on dumping and injury, including references to matters of fact and law which led to the acceptance or rejection of arguments.¹¹ Article 12.2.2 requires that investigating authorities provide reasons for the acceptance or rejection of claims by exporters or importers, either through public notice or a separate report.

17. The WTO agreements require that authorities provide more than cursory assertions to justify their decisions to impose definitive antidumping duty measures. Under Article 12.2.2 of the AD Agreement:

A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of a price undertaking shall contain, or make available through a separate report, all relevant information on matters of fact and law and reasons which have led to the imposition of final measures or the acceptance of a price

¹⁰ *EC-Salmon (Panel)*, para. 7.805.

¹¹ *See generally* EU First Written Submission, paras. 128-66.

undertaking, due regard being paid to the requirements for protection of confidential information. In particular, the notice or report shall contain the information described in subparagraph 2.1, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers, and the basis for any decision made under subparagraph 10.2 of Article 6.

18. The calculations employed by an investigating authority to determine dumping margins, and the data underlying the authority’s calculations, constitute “relevant information on matters of fact and law and reasons which have led to the imposition of final measures” within the meaning of Article 12.2.2. The calculations themselves are the mathematical basis for arriving at the dumping margins imposed by an investigating authority. Therefore, they are highly “relevant” to the decision to apply definitive measures. They are “matters of fact” because they consist of sales and cost data and mathematical uses of these data. Further, they lead to the imposition of definitive measures, because if they result in an affirmative dumping margin, then an investigating authority may apply definitive measures.

19. The requirements of Article 12.2.2 of the AD Agreement avoid opacity in decision making. Consequently, where the record reveals that an investigating authority provided only cursory assertions to justify their decisions to impose definitive antidumping duty measures, that investigating authority will have acted inconsistently with its obligations under this provision.

V. China’s Injury Determination Must Comply with the Requirements of Article 3 of the AD Agreement

A. Article 3.2 Claims

20. The EU contends that China’s findings on price effects are inconsistent with Articles 3.1 and 3.2 of the AD Agreement. Specifically, the EU challenges MOFCOM’s findings of price undercutting and price depression.¹² Article 3.2 of the AD Agreement provides that, with respect to the effects of dumped imports on prices, authorities must examine whether there has been significant price undercutting or whether the effect of the imports has been significantly to depress subject import prices or prevent price increases, while Article 3.1 requires an investigating authority to base its determination of injury on positive evidence and to objectively examine the effect of dumped imports on prices.

21. Article 3.1 of the AD Agreement imposes two important requirements on authorities that make injury determinations. The first is that the determination be based on “positive evidence.” The Appellate Body has referenced with approval a description of “positive evidence” as “evidence that is relevant and pertinent with respect to the issue being decided, and that has the

¹² See generally EU First Written Submission, paras. 167-171.

characteristics of being inherently reliable and trustworthy.”¹³

22. The second requirement is that the injury determination involve an “objective examination” of the volume of the dumped imports, their price effects, and their impact on the domestic industry. The Appellate Body has stated that, to be “objective,” an injury analysis must be “based on data which provides an accurate and unbiased picture of what it is that one is examining”¹⁴ and be conducted “without favouring the interests of any interested party, or group of interested parties, in the investigation.”¹⁵ Furthermore, the requirement that the examination be “objective” mandates that “the ‘examination’ process must conform to the dictates of the basic principles of good faith and fundamental fairness.”¹⁶

23. Article 3.2 of the AD Agreement describes further the nature of the examination that authorities must conduct to determine the price effects of dumped imports. It states that:

With regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been significant price undercutting by the dumped imports as compared with the price of a like product of an importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent prices increases, which otherwise would have occurred, to a significant degree.

24. As the Panel in *EC– Pipe Fittings* emphasized, Article 3.2 of the AD Agreement does not require an authority to use any particular type of price undercutting analysis.¹⁷ There is no single correct methodology for examining price comparisons in conducting such an analysis. Nor is a finding of price undercutting a prerequisite to finding price depression. Rather, Article 3.2 of the AD Agreement states that authorities are to examine whether there has been significant price undercutting by the dumped imports *or* whether the effect of the imports has been significantly to depress subject import prices or prevent price increases that would have otherwise occurred. The use of the disjunctive indicates that authorities can find significant undercutting without finding significant price depression or suppression, or that they can find significant price depression or suppression without finding significant undercutting.

25. Accordingly, the authorities are required to consider whether there is price undercutting, as well as whether there is price depression or price suppression, but are not required to make

¹³ *Mexico – Rice (AB)*, paras. 164-65; *see also EC– Pipe Fittings (Panel)*, para. 7.226, upheld on this issue, WT/DS219/AB/R.

¹⁴ *Mexico – Rice (AB)*, para. 180 (quoting *Mexico – Rice (Panel)*, para. 7.79).

¹⁵ *Id.* (quoting *US – Hot-Rolled Steel (AB)*, para. 193).

¹⁶ *US – Hot-Rolled Steel (AB)*, para. 193.

¹⁷ *EC – Pipe Fittings (Panel)*, para. 7.277.

any particular findings about any of these inquiries.¹⁸ To the extent an authority relies on findings of any of these type of price effects, however, Article 3.1 of the AD Agreement requires that those findings be supported by positive evidence.

26. Furthermore, the analytical methodology an authority uses in its price effects analysis must conform with the “objective examination” standard specified in Article 3.1 of the AD Agreement.¹⁹ This requirement pertains both to comparisons of prices between domestically produced and imported products to examine price undercutting,²⁰ and comparisons of prices of domestically produced products over time to examine price depression. To satisfy the objective examination standard, the authority must compare equivalent products sold at the same level of trade.

27. In this respect, the United States shares the EU’s concern that use of average unit values (AUVs) in making pricing comparisons may fail to yield objective price comparisons in certain circumstances.²¹ We take no position on the EU’s factual allegations. Nevertheless, we agree with the EU’s observation that, generally, AUVs provide a poor basis for pricing comparisons when the domestic like product and/or imports under investigation are not homogenous products but instead reflect a range of products with different characteristics and end-use applications. In such circumstances, differences in AUVs between domestically produced and imported products, or changes over time in AUVs of domestically produced products, may reflect differences in product mix rather than differences in pricing and thus would not provide an objective measure of price differences.²²

B. Article 3.4 Claims

28. The EU further claims that China’s analysis of the imports under investigation violates Articles 3.1 and 3.4 of the AD Agreement.²³ Article 3.4 requires investigating authorities to evaluate the factors enumerated in that provision, although it does not instruct in what manner an investigation authority must undertake that evaluation.

29. Article 3.4 specifies an authority’s obligation to ascertain the impact of dumped imports

¹⁸ *EC - Salmon (Panel)*, para. 7.638; *see also Thailand – H-Beams (Panel)*, para. 7.161; *US – Softwood Lumber VI (Panel)*, para. 7.67.

¹⁹ *See Mexico -Rice (AB)*, paras. 201-06.

²⁰ Contrary to China’s apparent assertion, *see* China First Written Submission, para. 442, that a product is dumped does not necessarily indicate that it is being sold at “low” prices in the market into which it is imported relative to prices in that market for the domestically produced product. In other words, dumping by itself does not demonstrate price undercutting for purposes of Article 3.2.

²¹ *See* EU First Written Submission, paras. 205-10.

²² We also observe that AUVs for domestically produced products and AUVs for imports may not necessarily measure transactions at the same level of trade.

²³ *See generally* EU First Written Submission, paras. 219-303.

on the domestic industry. In addition to requiring an analysis of “all relevant economic factors and indices having a bearing on the state of the industry,” the article enumerates certain specific factors which an authority must include in its analysis:

[A]ctual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

30. The Appellate Body has found that it is mandatory for an authority to evaluate each of the factors set out in Article 3.4.²⁴ The Appellate Body has also indicated, however, that Article 3.4 does not address the manner in which an authority’s analysis of each individual factor must be set out in the documents providing the explanation for its determination. Instead, whether an authority has satisfied its obligation to perform the requisite examination is to be ascertained under the particular facts and circumstances of each case.²⁵

C. Causal Link Claims under Articles 3.1 and 3.5 of the AD Agreement

31. The EU makes several claims that China’s causation analysis violates Articles 3.1 and 3.5 of the AD Agreement.²⁶ Articles 3.1 and 3.5 require an investigating authority to examine the causal relationship between dumped imports and injury, and to examine any known factors, other than the dumped imports, which are causing injury to the domestic industry.

32. Article 3.5 specifies an authority’s obligation to ascertain that dumped imports are causing injury. The article states in full:

[First Sentence] It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement.

[Second Sentence] The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities.

[Third Sentence] The 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 other factors must not be attributed to the dumped

²⁴ *EC – Pipe Fittings (AB)*, para. 156; *Thailand – H-Beams (AB)*, para. 125.

²⁵ *EC – Pipe Fittings (AB)*, paras. 157-61.

²⁶ *See generally* EU First Written Submission, paras.305-65,

imports.

[Fourth Sentence] Factors which may be relevant in this respect include, inter alia, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade-restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

Additionally, an authority's factual findings under Article 3.5 of the AD Agreement must comply with the "positive evidence" and "objective examination" requirements articulated in Article 3.1 of the AD Agreement.

33. The first sentence of Article 3.5 sets out the general requirement for a demonstration that dumped imports are causing injury under the AD Agreement, and – importantly – contains an explicit link back to Articles 3.2 (volume and price effects) and 3.4 (impact on domestic industries). If the volume or price effects findings are found to be inconsistent with Articles 3.1 and 3.2 and/or the impact findings are found to be inconsistent with Articles 3.1 and 3.4, an Article 3.5 causal link analysis relying on such findings would also fail. That is, if an authority relies on a price effects finding to support its impact and injury determinations, its decision must be supported by positive evidence on these counts. In such circumstances, a failure to demonstrate significant price effects or significant impact would constitute a failure to demonstrate that dumped imports are causing injury, as required by the first sentence of Article 3.5 of the AD Agreement.

34. The second and third sentences of Article 3.5 of the AD Agreement require an authority to examine "all relevant evidence" before it, both to ascertain whether there was a causal link between the dumped imports and the injury experienced by the domestic industry and to examine whether factors other than the dumped imports were also causing injury.

35. The third sentence provides that, before reaching the conclusion that the dumped imports were a cause of any difficulties experienced by the domestic industry, an authority must examine other known factors which are injuring the domestic industry. As the Appellate Body has found, if a factor other than dumped imports is a cause of injury, the third sentence of Article 3.5 requires the authority to engage in a non-attribution analysis to ensure that the effects of that other factor are not attributed to the dumped imports.²⁷ The Appellate Body has further stated that the AD Agreement does not specify the particular methods and approaches an authority may use to conduct a non-attribution analysis.²⁸

²⁷ *US-Hot-Rolled Steel (AB)*, paras. 223-224.

²⁸ *US-Hot-Rolled Steel (AB)*, para. 224. In a recent report explaining the nature of non-attribution analysis required for injury determination in safeguard proceedings conducted under the China Accession Protocol, the Appellate Body emphasized that "[t]he extent of the analysis of other causal factors that is required will depend on the impact of the other factors that are alleged to be relevant and the facts and circumstances of the particular case." *US– Tyres (AB)*, para. 252.

36. Under Article 3.5, the premise of a non-attribution analysis is that there is at least one known factor other than the dumped imports that is injuring the domestic industry. If there are no other known factors other than the dumped imports that are injuring the domestic industry, Article 3.5 would neither require nor contemplate that an authority will conduct a non-attribution analysis. Indeed, in such a circumstance, the authority can appropriately attribute all injury to the dumped imports.

37. The EU contends that MOFCOM's analysis of the effect of factors other than subject imports is unsupported by positive evidence and fails to consider all known factors other than subject imports that were alleged to be causing injury to the domestic industry.²⁹ We do not take a position on the EU's claims.

VI. Conclusion

38. As noted, the United States believes that the proper interpretation of the provisions of the AD Agreement discussed above has important systemic implications. In particular, transparency and due process commitments are critical elements of the AD Agreement vital to ensuring that anti-dumping measures are appropriately applied and that parties have a meaningful opportunity to defend their interests.

²⁹ EU First Written Submission, paras. 344-46, 351-62.