

***KOREA – ANTI-DUMPING DUTIES ON  
IMPORTS OF CERTAIN PAPER FROM INDONESIA***

**(WT/DS312)**

**THIRD PARTY SUBMISSION OF  
THE UNITED STATES**

**January 11, 2005**

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<i>EC – Cast Iron 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>Egypt – Rebar (Panel)</i>	Panel Report, <i>Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey</i> , WT/DS211/R, adopted October 1, 2002
<i>Guatemala – Cement II (Panel)</i>	Panel Report, <i>Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico</i> , WT/DS60/R, adopted 25 November 1998, as modified by the Appellate Body Report, WT/DS60/AB/R
<i>Mexico – HFCS (Panel)</i>	Panel Report, <i>Mexico – Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States</i> , WT/DS132/R, adopted 24 February 2000
<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 the 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 – Softwood Lumber AD Final (Panel)</i>	Panel Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada</i> , WT/DS264/R, adopted 31 August 2004, as modified by the Appellate Body Report, WT/DS264/AB/R
<i>US – Softwood Lumber ITC Investigation (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. 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”) that are relevant to this dispute. The United States addresses in this submission the proper interpretation of: (1) Article 6.10; (2) Article 2.2; (3) Article 2.4; (5) paragraph 7 of Annex II and Article 5.3, and the interrelationship between these provisions; (6) Article 5.8; (7) Article 2.6 and the scope of the “like product analysis;” (8) Article 3.2; (9) Article 3.5; (10) Article 4.1(i) and its application to domestic producers that import some subject merchandise; and (11) Article 6.9. The United States recognizes that many of the issues raised in this dispute are solely or primarily factual in nature. The United States takes no view as to whether, under the facts of this case, the measure at issue is consistent with the AD Agreement.

## **II. Article 6.10 Does Not Require Investigating Authorities to Determine Separate Dumping Margins for Separate Legal Entities If They Constitute a Single “Exporter” or “Producer”**

2. In this dispute, Indonesia claims that Korea breached Article 6.10 of the AD Agreement by treating three affiliated companies (Indah Kiat, Pindo Deli and Tjiwi Kimia) as a single “exporter,” and determining a single margin of dumping applicable to all three companies.<sup>1</sup> Indonesia argues that Article 6.10 does not permit an investigating authority to “treat distinct exporters that are separate natural or legal persons as a single ‘exporter’ for the purpose of calculating dumping margins.”<sup>2</sup> Indonesia’s claim is based on an incorrect interpretation of Article 6.10. Contrary to Indonesia’s arguments, where the facts demonstrate that multiple legal entities constitute a single “exporter” or “producer,” the investigating authority may, consistent with Article 6.10 of the AD Agreement, determine a single dumping margin for those entities.<sup>3</sup>

3. Article 6.10 of the AD Agreement states, in relevant part:

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

4. The AD Agreement does not define either the term “exporter” or “producer.” Therefore, there is nothing in the text of Article 6.10 that suggests that an investigating authority is precluded from identifying an “exporter” or a “producer” by reference to the actual commercial activity of companies rather than their corporate structure. To the contrary, the terms “exporter”

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<sup>1</sup> First Written Submission of Indonesia, paras. 120-129.

<sup>2</sup> First Written Submission of Indonesia, para. 121.

<sup>3</sup> Whether multiple entities comprise a single “exporter” or “producer” is, however, a question of fact that must be decided on a case-by-case basis. The United States takes no position on the question of whether Korea’s decision to treat Indah Kiat, Pindo Deli and Tjiwi Kimia as a single “exporter,” under the particular facts at issue in this dispute, is consistent with Article 6.10.

and “producer” themselves reflect commercial functions (*i.e.* exporting and producing) rather than corporate structure. In short, nothing in the text of Article 6.10 requires that the “exporter” or “producer” be defined on the basis of corporate formality rather than commercial reality.

5. The Appellate Body has recognized in *US - Hot-Rolled Steel* that separate legal entities that are affiliated by virtue of common ownership may constitute a “single economic enterprise” such that sales between them may not reflect ordinary market principles.<sup>4</sup> Similarly, the facts of a particular case may support a finding that the operations of two or more affiliated parties are so closely intertwined that the parties effectively constitute a single “exporter” or “producer” within the meaning of Article 6.10.<sup>5</sup> Nothing in Article 6.10, or any other provision of the AD Agreement, precludes such a finding.

6. In light of the foregoing, the Panel should find that Article 6.10 does not require investigating authorities to determine separate dumping margins for each legal entity if they, in fact, constitute a single “producer” or “exporter.”

### **III. Article 2.2 Does Not Limit An Investigating Authority’s Discretion to Use Constructed Value As “Facts Available” To Determine Normal Value In the Absence of Timely-Submitted, Verifiable Home Market Sales Data**

7. Indonesia claims that Korea breached Article 2.2 of the AD Agreement when the Korean investigating authority, the Korea Trade Commission (“KTC”), used constructed value as “facts available” to calculate the normal value of sales in the Indonesian market that was compared to export price under Article 2.1. Specifically, Indonesia argues that the KTC was obligated, under Article 2.2 to “expressly determine” one of the following before using constructed value as “facts available” to calculate normal value: (a) there was an insufficient volume of home market sales made in the ordinary course of trade; (b) there were no home market sales of the like product made in the ordinary course of trade; or (c) there existed a “particular market situation” in Indonesia, within the meaning of Article 2.2, that would justify the use of constructed value as

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<sup>4</sup> *US - Hot-Rolled Steel (AB)*, paras. 141-144. The Appellate Body explained that “where the parties to a transaction have common ownership, although they are legally distinct persons, usual commercial principles might not be respected between them. Instead of a sale between these parties being a transfer of goods between two enterprises which are economically independent, transacted at market prices, the sale effectively involves a transfer of goods within a single economic enterprise.” *US - Hot-Rolled Steel (AB)*, para. 141. The Appellate Body found that such sales could properly be disregarded in the antidumping analysis as being “outside the ordinary course of trade.” *US - Hot-Rolled Steel (AB)*, para. 141.

<sup>5</sup> Consider, for example, that a parent company has four factories, each separately incorporated and wholly-owned. Although there are five distinct legal entities, production and export of the subject merchandise is conducted by the corporate family as a whole. In such a case, it would be illogical to consider the parent company and each factory a separate “producer or exporter,” and Article 6.10 does not compel such a result.

the basis for normal value.<sup>6</sup> Indonesia's interpretation of Article 2.2 is flawed and undermines the provisions of Article 6.8 of the AD Agreement.

8. Article 6.8 expressly permits an investigating authority to rely on "facts available" in making a determination if a party to the proceeding does not provide necessary information within a reasonable period or significantly impedes the investigation.<sup>7</sup> Nothing in Article 6.8 limits an investigating authority's discretion in choosing from among the facts available in making its determination or imposes conditions on the use of certain categories of information, such as the cost information at issue in this dispute.<sup>8</sup> Moreover, paragraph 3 of Annex II makes clear that an investigating authority may disregard certain information if it is not verifiable or not submitted in a timely fashion.

9. Indonesia's argument, in effect, requires the Panel to ignore the text of Article 6.8 and to read into that provision a condition precedent to using constructed value as the "facts available" in determining normal value. Indonesia appears to suggest that the KTC would be required to use unverifiable or untimely-submitted home market sales data, unless it first determined that the conditions set forth in Article 2.2 of the AD Agreement were satisfied. This argument has no basis in the text of the AD Agreement. Article 2.2 imposes no obligations with regard to the selection of facts available. Moreover, there is no cross-reference in Article 2.2 to the facts available provisions of Article 6.8. Similarly, there is no cross-reference in Article 6.8 to Article 2.2. There is, thus, no legal basis for concluding that an investigating authority's discretion in the selection of facts available under Article 6.8 is subject to the obligations set out in Article 2.2 regarding the determination of normal value.

10. Moreover, Indonesia's argument is untenable as a matter of logic. Plainly, it is irrelevant whether there exist home market sales of a like product in the ordinary course of trade, a sufficient volume of home market sales, or a "particular market situation" preventing use of home market sales for comparison purposes if the home market sales data cannot be used because it was not timely-submitted or is unverifiable. Consistent with Article 6.8 and Annex II, the absence of the timely, verifiable home market sales data, in and of itself, warrants the use of facts available, including (but not limited to) constructed value or third country sales data.

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<sup>6</sup> First Written Submission of the Republic of Korea, 20 December 2004, paras. 104-124.

<sup>7</sup> Article 6.8 provides, in relevant part, that "[i]n cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period of time or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available."

<sup>8</sup> Article 6.8 requires that "the provisions of Annex II shall be observed in the application of this paragraph." Annex II also does not limit an investigating authority's discretion in choosing among the facts available. It only obligates authorities to exercise "special circumspection" when basing their findings on information from a secondary source. *See* Annex II, para. 7.

11. In light of the foregoing, the Panel should find that Article 2.2 does not limit an investigating authority's discretion to use constructed value as "facts available" to determine normal value for purposes of conducting the dumping calculation in the absence of timely-submitted, verifiable home market sales data.

**IV. Article 2.4 Of The AD Agreement Requires Adjustment To Price Only Where Differences In Selling Expenses Affect Price Comparability**

12. Indonesia claims that Korea breached its obligation under Article 2.4 of the AD Agreement by failing to make "due allowance" for certain differences in selling expenses between the Korean and Indonesian markets.<sup>9</sup> Before this Panel, Indonesia cites differences in average per-sale prices and average per-customer quantities for subject merchandise in the Korean and Indonesian markets to support its argument that there were different levels of trade in the two markets.<sup>10</sup> Indonesia argues that,

[t]he proper inquiry is whether the domestic market price includes expenses that are not also included in the export price. If so, as in this instance, those expenses must be deducted from the normal value in order to arrive at the price had the domestic market sales been made in the same manner as the export sales.<sup>11</sup>

13. Indonesia misstates the obligations under Article 2.4. Contrary to Indonesia's arguments, Article 2.4 obligates an investigating authority to make "due allowance" only for differences that are "demonstrated to affect price comparability."

14. Article 2.4 sets out the general principles that apply in conducting a "fair comparison" of export price and normal value. Specifically, Article 2.4 states that the comparison between the export price and the normal value "shall be made at the same level of trade" and "[d]ue allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in . . . levels of trade. . . , and any other differences which are also demonstrated to affect price comparability."

15. For a level of trade adjustment under Article 2.4, therefore, two requirements must be satisfied. First, the evidence must demonstrate that the sales being compared were made at different levels of trade. Second, the difference in levels of trade must be shown to have had an effect on "price comparability." Further, as Article 2.4 states that "due allowance" shall be made

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<sup>9</sup> First Written Submission of Indonesia, para. 116.

<sup>10</sup> First Written Submission of Indonesia, para. 115.

<sup>11</sup> First Written Submission of Indonesia, para. 117.

“in each case, on its merits,” the effect on price comparability must be demonstrated based on the facts of the particular case.<sup>12</sup>

16. Article 2.4 explicitly recognizes that not all differences in expenses – with or without a difference in level of trade – warrant an adjustment. Specifically, Article 2.4 expressly conditions making “due allowance” for differences on a demonstration that the differences affect “price comparability.” In fact, the term “price comparability” is referenced three times in Article 2.4 as a prerequisite for “due allowance.” If *any* difference in expenses warranted an adjustment under Article 2.4, regardless of whether it had an effect on price comparability, those references would be rendered meaningless. Thus, in addition to finding significant differences in expenses, the evidence must also demonstrate that those differences affect price comparability before “due allowance” must be made under Article 2.4.

17. Given the express limitations in the text of Article 2.4, the Panel should reject Indonesia’s suggestion that Article 2.4 requires an adjustment for any and all differences in expenses.

**V. Examining Information in the Application for Initiation Under Article 5.3 of the AD Agreement Does Not Necessarily Satisfy the Obligation To Corroborate Information from Secondary Sources Under Paragraph 7 of Annex II**

18. Indonesia claims in its first submission that Korea breached its obligations under paragraph 7 of Annex II of the AD Agreement because the KTC failed to corroborate the secondary information used as facts available for Tjiwi Kimia, a non-responding Indonesian company.<sup>13</sup> Korea responds by arguing that, as part of the initiation process, the KTC examined the information in the application and found it to be accurate and adequate as required by Article 5.3 of the AD Agreement.<sup>14</sup> The United States notes, in this regard, that the obligations under Article 5.3 and paragraph 7 of Annex II are distinct. The obligation to corroborate information from secondary sources under Paragraph 7 of Annex II is not necessarily satisfied by an investigating authority’s examination of the information in an application for initiation during the initiation process.

19. An examination under Article 5.3 of the “accuracy and adequacy of the evidence provided in the application” conducted prior to initiation is aimed at determining whether the information in the application constitutes “sufficient evidence to justify the initiation.” Paragraph 7 of Annex II, in contrast, requires authorities to corroborate “information supplied in

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<sup>12</sup> The United States expresses no view regarding the WTO-consistency of the factual determination made by the Korean investigating authorities that there was insufficient evidence of an effect on price comparability to warrant an adjustment for differences in selling expenses in the investigation at issue in the instant dispute. Final Dumping Report at 7 (Exhibit IDN-15(b)).

<sup>13</sup> First Written Submission of Indonesia, paras. 83-88.

<sup>14</sup> First Written Submission of Korea, para. 99.



the application for the initiation of the investigation” when authorities “have to base their findings” upon such information.<sup>15</sup> The obligation to corroborate information for purposes of making the determinations referenced in paragraph 7 of Annex II is therefore separate and distinct from the obligation to examine the “adequacy and accuracy” of information for purposes of initiation under Article 5.3. Moreover, the steps taken to satisfy the obligation under Article 5.3 may, or may not, also satisfy the obligation under paragraph 7 of Annex II, depending on the facts and circumstances of the case.<sup>16</sup>

20. For example, the allegations in an application may be supported by information regarding the applicant’s own cost data because that is all that is reasonably available to the applicant. That information may be examined and found to be adequate and accurate for purposes of initiation of an investigation under Article 5.3. However, the probative value of the information may be called into question because of further information received in the course of the investigation. In such a case, the examination under Article 5.3 would not, by itself, satisfy the obligation under paragraph 7 of Annex II to corroborate the information based on independent sources at the disposal of the investigating authority. In contrast, the allegations in the petition may be based on specific information on actual export sales or publicly available statistical data “the accuracy and adequacy” of which is checked by the investigating authority for purposes of initiation. In that case, no further checking may be necessary to satisfy the obligation under paragraph 7 of Annex II to corroborate the information if the information were used as “facts available.”

21. In light of the foregoing, the Panel should recognize that the obligations under Article 5.3 and paragraph 7 of Annex II are distinct, and that the obligation to corroborate information from secondary sources under paragraph 7 of Annex II is not necessarily satisfied by an investigating authority’s examination of the information in an application during the initiation process. Therefore, the Panel should address the factual issue as to whether the examination performed by the KTC for purposes of the initiation of the investigation under Article 5.3 also fulfilled the obligation under paragraph 7 of Annex II given the particular circumstances at issue in this dispute.

## **VI. Article 5.8 of the AD Agreement Does Not Require Immediate Termination of an Investigation Upon Calculation of a Preliminary *De Minimis* Dumping Margin for A Responding Party**

22. Indonesia claims that Korea breached its obligations under Article 5.8 of the AD Agreement because the KTC did not immediately terminate the investigation as to an Indonesian

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<sup>15</sup> Paragraph 7 of Annex II provides that, where investigating authorities rely on secondary sources for the facts available, they “should, where practicable, check the information from other independent sources at their disposal, such as published price lists, official import statistics and customs returns, and from the information obtained from other interested parties during the investigation.”

<sup>16</sup> The United States takes no position as to whether, under the facts at issue in this dispute, Korea’s actions for initiation purposes satisfy the requirements under paragraph 7 of Annex II.

responding party, Indah Kiat, upon calculating a preliminary *de minimis* dumping margin for that company.<sup>17</sup> Indonesia’s argument is based on a flawed interpretation of Article 5.8. Under Article 5.8, the obligation to terminate an investigation upon a finding of no or *de minimis* dumping applies solely with respect to final determinations of dumping.

23. Article 5.8 of the AD Agreement states, in relevant part:

An application under paragraph 1 shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or injury to justify proceeding with the case. There shall be immediate termination in cases where the authorities determine that the margin of dumping is *de minimis*, or that the volume of dumped imports, actual or potential, or the injury, is negligible.

24. The second sentence of Article 5.8 – on which Indonesia ostensibly relies – states that when the investigating authority “determines” that dumping or injury does not exist, it shall immediately terminate the investigation. In this context, the ordinary meaning of the term “determine” is to “bring to an end, conclude,” to “settle or decide.”<sup>18</sup> A preliminary determination of dumping in an investigation does not “settle or decide” the question of whether there are any or *de minimis* dumping margins in a particular investigation. To the contrary, after the preliminary determination, the investigating authority may continue to collect information, verify the information provided, and consider the arguments of the parties as to whether the information at issue should be analyzed differently than in the preliminary determination. For this reason, the panel in *Guatemala – Cement II* recognized that:

there is no guarantee that the factual basis for the preliminary determination will be the same as that of the final determination. The factual basis may change, for example, if a preliminary affirmative determination of injury is made on the basis of data provided by the complainant, and if some (or all) of that data are shown to be erroneous during verification of the domestic industry.<sup>19</sup>

Thus, for purposes of Article 5.8, the applicable margin of dumping is not “settled or decided” until the issuance of the final determination of dumping.

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<sup>17</sup> First Written Submission of Indonesia, para. 130.

<sup>18</sup> *The New Shorter Oxford English Dictionary*, 1993, at 651.

<sup>19</sup> *Guatemala – Cement II (Panel)*, para. 8.177.

25. That termination of an investigation is not required as of the time of a negative or *de minimis* preliminary finding of dumping is further confirmed when one considers the first sentence of Article 5.8. The first sentence of Article 5.8 explicitly addresses termination prior to a final determination, *i.e.*, at the application stage if the application fails to meet the standards in Articles 5.2 and 5.3, or during the course of the investigation, if the authorities are “satisfied” that there is insufficient evidence to “proceed[] with the case.”

26. The first sentence of Article 5.8 expressly conditions the obligation to terminate an investigation prior to a final determination on the investigating authority being “satisfied” that the evidence does not warrant proceeding further. The fact that an investigating authority preliminarily determines that there is no or *de minimis* dumping does not mean that the investigating authority is “satisfied” that there is no basis for proceeding with the investigation. As discussed above, the investigating authority may find on the basis of additional evidence submitted, verification conducted, or arguments made after the preliminary determination that dumping in fact exists.

27. Given the very nature of preliminary determinations, it is likely that an investigating authority will not be “satisfied” at the preliminary determination stage that the evidence before it warrants terminating the investigation. Thus, Indonesia’s effort to read into the second sentence of Article 5.8 an unqualified obligation to terminate an investigation whenever there is a negative preliminary determination cannot be reconciled with the explicit standard in the first sentence of Article 5.8.

28. The flaw in Indonesia’s argument becomes further apparent when one considers that there is no requirement in the AD Agreement that an investigating authority issue a preliminary determination.<sup>20</sup> Under Indonesia’s argument, an investigating authority would be obligated to terminate an investigation immediately upon issuance of a negative or *de minimis* preliminary determination of dumping. However, the investigating authority could avoid terminating the investigation under the AD Agreement, at least until the issuance of a final determination, simply by declining to issue a preliminary determination. Indonesia’s proposed interpretation of Article 5.8 would do nothing more than discourage investigating authorities from issuing preliminary determinations in situations where the findings would be negative.

29. For the reasons above, Indonesia’s interpretation of Article 5.8 is incorrect. The Panel should find that, under Article 5.8, the obligation to terminate an investigation upon a finding of no or *de minimis* dumping applies solely with respect to final determinations of dumping. It is only at this point that an investigating authority “determines” (*i.e.* concludes or settles the issue of) whether dumping has occurred.

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<sup>20</sup> However, provisional measures cannot be imposed under Article 7 of the AD Agreement unless an affirmative preliminary determination of dumping and injury is made. Under Article 7, therefore, an investigating authority that makes a negative preliminary determination may not impose provisional measures.

**VII. An Investigating Authority Does Not Act Inconsistently With Article 2.6 or Fail to Take Into Account Differences in the Markets for Different Products Simply by Defining the “Like Product” to Include Items that are Not Identical to Each of the Items Comprising the Product Under Consideration**

30. Indonesia claims that the definition of “like product” employed by the KTC is inconsistent with the AD Agreement.<sup>21</sup> Although Korea and Indonesia agree that both uncoated plain paper copier paper and uncoated woodfree printing paper are within the scope of the imported product “subject to consideration,” within the meaning of Article 2.6, Indonesia objects to the KTC’s finding that there was one domestic like product consisting of both types of uncoated paper.<sup>22</sup>

31. While it takes no position on the merits of Indonesia’s factual arguments, the United States respectfully requests the Panel, in assessing the like product claims of Indonesia, to take into account the following general points concerning the definition of the like product in antidumping cases and the relationship between that definition and the injury analysis.

32. First, Article 2.6 provides that “[t]hroughout this Agreement, the term ‘like product’ (‘produit similaire’) shall be interpreted to mean a product which is identical, *i.e.* alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.” The “like product” analysis requires a comparison of the *overall* scope of the product under consideration with the *overall* scope of the like product. As recognized by the panel in *US – Softwood Lumber AD Final*, there is no requirement that each *individual* item within the “like product” be “like” each *individual* item within the imported product subject to consideration.<sup>23</sup>

33. Further, as there are no substantive obligations other than those set out in Article 2.6 relating to the definition of the appropriate “like product” in each particular investigation, it is left to the discretion of the investigating authorities to determine which domestic product is “alike in all respects, or . . . has characteristics closely resembling those of the product under consideration.” As long as their findings are based on positive evidence and an objective

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<sup>21</sup> First Written Submission of Indonesia, paras. 142-153.

<sup>22</sup> First Written Submission of Indonesia, para. 153.

<sup>23</sup> *US – Softwood Lumber AD Final (Panel)*, para. 7.157. Although the *Softwood Lumber* panel made this finding with respect to claims concerning the dumping determination and the definition of the like product used to determine domestic industry standing, the reasoning is equally applicable with respect to the like product definition as it is used for purposes of determining the domestic industry in an injury determination. See *US – Softwood Lumber AD*, paras 7.140-7.143. Indeed, the provision addressed by the *Softwood Lumber* panel – Article 2.6 – is the only provision of the AD Agreement that defines “like product,” and it expressly states that the same definition applies “[t]hroughout this Agreement.”

examination of the relevant facts, the determination of the investigating authorities regarding the “like product” must be respected.<sup>24</sup>

34. Second, the United States notes that, by determining that there is only one “like product” for purposes of an injury determination, an investigating authority does not necessarily fail to “distinguish between the markets” for different types of the product subsumed within the single like product, as Indonesia suggests.<sup>25</sup> There are a number of ways in which the AD Agreement allows for authorities to take into account differences in the markets for different types of products within the same like product. To give just one example, the panel in *Mexico – HFCS* noted that “an analysis of the particular sector in which competition between the domestic industry and dumped imports is most direct is certainly allowed under the [AD] Agreement.”<sup>26</sup>

### **VIII. Article 3.2 of the AD Agreement Requires That Investigating Authorities “Consider” Whether There Was Significant Price Undercutting By Subject Imports**

35. Indonesia challenges the KTC’s findings regarding the price impact of subject imports, claiming that there was no positive evidence that would permit an investigating authority to find that there was price undercutting by subject imports within the meaning of Article 3.2 of the AD Agreement.<sup>27</sup> The United States agrees that each injury determination – including the one at issue in this dispute – must be supported by positive evidence, as required under Article 3.1. However, the United States notes that Article 3.2 does *not* require the authorities to find significant volume increases, price undercutting, or price effects as a precondition to making an affirmative injury determination.

36. Article 3.2 of the AD Agreement simply requires that the authorities *consider* whether there have been significant volume increases and significant price undercutting, and whether subject imports have had significant price depressing or suppressing effects. As previous panels have correctly recognized, this means that the investigating authorities need only “give attention

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<sup>24</sup> See Article 3.1 of the AD Agreement (“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.”) and Article 17.6 (“the panel shall determine whether the authorities’ establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective.”)

<sup>25</sup> See First Submission of Indonesia, para. 151.

<sup>26</sup> *Mexico – HFCS (Panel)*, para. 7.160. The panel in *Mexico - HFCS* clarified, however, that “such an analysis [of specific market sectors] does not excuse the investigating authority from making the determination required by that Agreement – whether dumped imports injure or threaten injury to the domestic industry as a whole.” *Mexico – HFCS (Panel)*, para. 7.160.

<sup>27</sup> First Written Submission of Indonesia, paras. 159-161, 164.

to” or “take into account” the volume and price factors set out in Article 3.2.<sup>28</sup> Further, Article 3.2 specifically provides that “[n]o one or several of these factors can necessarily give decisive guidance.”

37. Thus, although it must be discernable from an investigating authority’s determination that it “considered” the Article 3.2 factors, the investigating authority is not required to make any specific finding as to the Article 3.2 factors in order to reach an affirmative injury determination.

**IX. Article 3.5 Does Not Prescribe a Particular Methodology to be Used In Determining Whether Dumped Imports Are the Cause of Injury to Domestic Producers or Specify the Level of Detail At Which the Analysis Must be Conducted**

38. Indonesia challenges Korea’s analysis of whether dumped imports were the “cause” of injury to the domestic producers of the like product, claiming that Korea did not undertake a sufficiently detailed analysis under Article 3.5.<sup>29</sup> Further, Indonesia claims that Korea failed to conduct a proper analysis of the effects of non-subject imports under Article 3.5.<sup>30</sup>

39. The United States notes, again, that it takes no position as to the factual issues raised by Indonesia. Nonetheless, the United States points out that, while Article 3.5 of the AD Agreement sets out several factors that “may” be considered by investigating authorities in ascertaining whether there is a “causal relationship” between dumped imports and injury to the domestic industry,<sup>31</sup> it does not specify the type of information that the authorities must collect and examine or the detail in which they must explain their analysis of the information. Rather, Article 3.5 simply provides that the investigating authority must determine, on the basis of “all relevant evidence” before it, whether such a causal relationship exists.

40. Similarly, Article 3.5 provides that the investigating authorities must examine any known factors other than the dumped imports which are injuring the domestic industry to ensure that injury caused by these other factors is not attributed to the dumped imports. As the Appellate Body has recognized, however, the AD Agreement does not prescribe the particular methods and approaches to be used by investigating authorities to separate and distinguish the injurious effects

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<sup>28</sup> *Thailand – H-Beams (Panel)*, para. 7.161; *US – Softwood Lumber ITC Investigation (Panel)*, para. 7.67.

<sup>29</sup> First Written Submission of Indonesia, paras. 180-187.

<sup>30</sup> First Written Submission of Indonesia, para. 180.

<sup>31</sup> Article 3.5 provides that “{f}actors 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.”

of unfair imports from the injurious effects of the other known causal factors.<sup>32</sup> Further, the decision as to the types and amount of information concerning “other factors,” including non-subject imports, that will be collected and examined by the investigating authorities is left to their discretion.<sup>33</sup>

## **X. The Fact That Some Domestic Producers Import the Subject Merchandise Does Not Preclude an Affirmative Injury Finding**

41. Indonesia claims that Korea breached various provisions of the AD Agreement because, in making its injury determination, the KTC failed to take into account the fact that some members of the domestic industry were importing subject merchandise from the countries under investigation.<sup>34</sup>

42. The United States notes, in this regard, that the fact that domestic producers may themselves be importing some dumped merchandise does not preclude an affirmative injury finding. Indeed, Article 4.1(i) provides investigating authorities with the *discretion* to exclude from the domestic industry those domestic producers that are importing the dumped product.<sup>35</sup> Neither Article 4.1(i), nor any other provision of the AD Agreement, *requires* that such domestic producers be excluded from the domestic industry in order to make an affirmative finding of injury.

43. This is not surprising as there may be situations in which members of the domestic industry have found that the only way that they can survive is by importing some subject merchandise. In such circumstances, the actions of the domestic producers may simply be indicators of the magnitude of the impact of the subject imports.

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<sup>32</sup> *EC – Cast Iron Fittings (AB)*, para. 189 (stating that “provided that the investigating authority does not attribute the injuries of other causal factors to dumped imports, it is free to choose the methodology it will use in examining the ‘causal relationship’ between dumped imports and injury.”)

<sup>33</sup> *See Egypt – Rebar (Panel)*, para. 7.102 (“We note that neither of the provisions cited above [Articles 3.1 and 3.5] refers to any of the particular kinds of evidence that Turkey argues should have been gathered and examined, or indeed to any kind or type of evidence at all.”)

<sup>34</sup> First Written Submission of Indonesia, paras. 188-195.

<sup>35</sup> Article 4.1 (i) provides that “when producers are . . . themselves importers of the allegedly dumped product, the term ‘domestic industry’ *may* be interpreted as referring to the rest of the producers.” (Emphasis added).

## XI. Article 6.9 Requires That Interested Parties Be Given Advance Notice Of the *Facts* Under Consideration, Not the Legal Reasoning of the Authorities

44. Indonesia claims that Korea breached Article 6.9<sup>36</sup> because the KTC failed to inform the interested parties in advance that it would determine that subject imports were causing present material injury, rather than threatening to cause material injury.<sup>37</sup> The United States notes that, contrary to Indonesia’s arguments, Article 6.9 does not obligate the investigating authorities to give interested parties advanced notice of the *legal reasoning* of their determination. Rather, Article 6.9 requires investigating authorities to inform the interested parties of the “essential *facts* under consideration which form the basis for the decision whether to apply definitive measures.”<sup>38</sup> (Emphasis added).

45. Further, nothing in Article 6.9 obligates authorities to inform interested parties whether their final injury determination will be based on present injury rather than threat of injury. As the panel recognized in *Egypt - Rebar*, Article 3.4 requires that the relevant economic factors be considered in every investigation “no matter what particular manifestation or form of injury is at issue in a given investigation.”<sup>39</sup> Given the applicability of Article 3.4 to evaluations of both present material injury and threat of material injury, much of the same factual information would need to be examined to reach either determination. Thus, there is no breach of Article 6.9 simply because an investigating authority changes from a threat of injury preliminary determination to a present injury final determination.<sup>40</sup>

## XII. Conclusion

46. The United States thanks the Panel for providing an opportunity to comment on the issues at stake in this proceeding, and hopes that its comments will prove to be useful.

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<sup>36</sup> Article 6.9 provides that “[t]he 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.”

<sup>37</sup> First Written Submission of Indonesia, para. 202.

<sup>38</sup> See, also, *Argentina – Poultry (Panel)*, para. 7.225 (examining Article 6.9 and stating that “the failure to inform an interested party of a reason does not equate to failure to inform an interested party of an essential fact”).

<sup>39</sup> *Egypt – Rebar (Panel)*, para 7.95; (stating that “no matter what the initial or final scope of the injury investigation is, the Article 3.4 factors would need to have been examined in either a case of present material injury or of threat of material injury”).

<sup>40</sup> *Compare Egypt – Rebar (Panel)*, paras. 7.91-7.96 (finding that there was no inconsistency with Articles 6.1 and 6.2 – which require that interested parties have notice of the information needed by investigating authorities and an opportunity to provide the information and defend their interests – where an investigating authority had initially indicated that it was assessing the threat of material injury but finally determined that there existed present material injury.)