# *Morocco – Anti-Dumping Measures on Certain Hot-Rolled Steel from Turkey*

# (WT/DS513)

Responses of the United States of America to the Panel's
Questions to Third Parties

December 19, 2017

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| *Mexico – Anti-Dumping Measures on Rice (AB)* | Appellate Body Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice*, WT/DS295/AB/R, adopted 20 December 2005 |
| *Mexico – Olive Oil (Panel)* | Panel Report, *Mexico – Definitive Countervailing Measures on Olive Oil from the European Communities*, WT/DS341/R, adopted 21 October 2008 |
| *US – Hot-Rolled Steel (AB)* | Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001 |

**1.1. Can a determination of material retardation of establishment of industry be made only in respect of a domestic industry that is not yet established? If so, which provision of the covered agreements sets out that limitation?**

1. Footnote 9 of Article 3 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement") provides the definition of "injury." Specifically, footnote 9 states:

> Under this Agreement the term "injury" shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article.

Therefore, footnote 9 defines injury to encompass three situations: (1) material injury to a domestic industry; (2) threat of material injury to a domestic industry; or (3) material retardation of the establishment of such an industry.

2. With respect to the third form of injury, "material retardation of the establishment of such an industry," the text of footnote 9 links the "material retardation" finding to the "establishment" of a domestic industry. As the United States previously articulated in its submission,[1] read together, the ordinary meaning of the terms "material retardation of the establishment of … an industry" would suggest a [*material*] consequential or important [*retardation*] hindrance or delay of the accomplishment of the [*establishment*] bringing into being, or setting up on a secure basis, of an industry.

3. This reading is consistent with the findings of the panel in *Mexico – Olive Oil*, which considered the issue in the context of Article 16.1 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"). There, the panel rejected the European Communities' argument that "establishment" did not refer to the point of starting up a business, but rather to the achievement of a level of maturity.[2] Instead, the panel found that, "the ordinary meaning of the term 'establishment' in the context of material retardation includes the starting up, or bringing into being or founding, of an industry, which means that an applicant in such a situation may not yet be a domestic industry."[3]

**1.2. In the context of making a determination that the establishment of the domestic industry is materially retarded, is an investigating authority under an obligation to determine that that industry is unestablished, and if so, where does that obligation lie in the covered agreements?**

4. As discussed above, the text of footnote 9 of Article 3 links a "material retardation" finding with "establishment" of a domestic industry. Therefore, an investigating authority cannot make a material retardation finding without first ascertaining whether the industry is already established.

5. However, as the United States explained in its submission,[4] the "establishment" of a domestic industry can occur either at the point an industry comes into being (for example, by commencing production), or at which it achieves stability. If an investigating authority determines that the domestic industry has not been established, then it may consider whether the performance

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[1] U.S. Third Party Submission, para. 20.
[2] *Mexico - Olive Oil (Panel)*, para. 7.204.
[3] *Mexico - Olive Oil (Panel)*, para. 7.204.
[4] U.S. Third Party Submission, para. 21.

of the industry reflects normal start-up difficulties or whether the imports of the subject merchandise have materially retarded the establishment of the domestic industry.[5]

**1.3. In *China – Cellulose Pulp*, the panel considered that the basic principles that the injury determination be based on "positive evidence" and involve an "objective examination" in Article 3.1 inform the more detailed provisions set out in the remainder of Article 3, and do not, "establish independent obligations which can be judged in the abstract, or in isolation and separately from the substantive requirements set out in the remainder of Article 3". It further considered that a panel, in its review of an investigating authority's determination of injury will be required to decide whether the investigating authority complied with the relevant substantive and procedural obligations, consistently with the fundamental principles set out in Article 3.1. It took the view that this does not, however, "mean that a claim of inconsistency with Article 3.1 can normally be made independently of other provisions of Article 3".**

**In light of the panel's consideration in *China – Cellulose Pulp*, as set out above, could a determination that the domestic industry was unestablished be found inconsistent with Article 3.1, independently of other provisions of Article 3?**

6. In the United States' view, Article 3.1 sets forth overarching obligations that apply to multiple aspects of an investigating authority's injury determinations. Article 3.1 may also be considered independently of other provisions of Article 3 because the term "shall" reflects a mandatory obligation.

7. Article 3.1 provides:

> A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an *objective examination* of both *(a)* the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and *(b)* the consequent impact of these imports on domestic producers of such products.

8. As the United States explained in its submission,[6] the first overarching obligation in Article 3.1 is that the injury determination be based on "positive evidence." The Appellate Body has endorsed a description of "positive evidence" as "evidence that is relevant and pertinent with respect to the issue being decided, and that has the characteristics of being inherently reliable and trustworthy."[7] The second obligation is that the injury determination involves 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" and be conducted "without favouring the interests of any interested party, or group of interested parties, in the investigation."[8]

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[5] In determining whether a domestic industry is established, an investigating authority may examine several or all of the following criteria: (1) when the domestic industry began production; (2) whether the production has been steady or start-and-stop; (3) the size of domestic production compared to the size of the domestic market as a whole; (4) whether the industry has reached a reasonable "break-even point"; and (5) whether the activities are truly a new industry or merely a new product line of an established industry. *See* Turkey's First Written Submission, para. 8.28 (citing to *Antidumping and Countervailing Duty Handbook* (Exhibit TUR-40)).

[6] U.S. Third Party Submission, para. 24-25.

[7] *Mexico – Anti-Dumping Measures on Rice (AB)*, paras. 163-164.

[8] *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 180; *US – Hot-Rolled Steel (AB)*, para. 193.

9. The term "shall" in Article 3.1 reflects a mandatory obligation. Thus, an investigating authority's injury determination "shall" be based on "positive evidence" and involve an "objective examination." Nothing in the text of Article 3.1 suggests that its obligations are only consequentially based on the breach of another provision of Article 3. In light of this understanding, a panel may consider whether an investigating authority's determination was consistent with the obligations set forth under Article 3.1 independent of other provisions.

10. In sum, the text of Article 3.1 reflects a mandatory obligation not contingent upon the finding of breach elsewhere in Article 3.

**1.4. In its oral statement, Japan indicated that the terms "such an industry" in footnote 9 refer to the definition of domestic industry in Article 4, which, in turn, is linked to the concept of like product. Please elaborate on whether the concept of "new industry" should consider the definition of domestic industry, and the relationship it maintains with the definition of like product.**

11. The United States agrees that the terms "such an industry" in footnote 9 of Article 3 are informed by Article 4.1 of the AD Agreement, which generally defines a "domestic industry" as referring to "the domestic producers as a whole of the like products or to those of them whose collective output of the products constitute a major proportion of the total domestic production of those products."

12. Article 2.6 of the AD Agreement then defines the term "like product" "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." Therefore, pursuant to Article 2.6, the "like product" is defined based on the "product under consideration."

13. In determining whether "such an industry" is established, an investigating authority may examine several or all of the following criteria: (1) when the domestic industry began production; (2) whether the production has been steady or start-and-stop; (3) the size of domestic production compared to the size of the domestic market as a whole; (4) whether the industry has reached a reasonable "break-even point"; and (5) whether the activities are truly a new industry or merely a new product line of an established industry.[9]

[9] *See* U.S. Third Party Submission, para. 21 n. 24 (citing Turkey's First Written Submission, para. 8.28; *Antidumping and Countervailing Duty Handbook* (Exhibit TUR-40)).