Korea – Anti-Dumping Duties on Pneumatic Valves from Japan
(DS504)

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

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Argentina – Import Measures (AB)	Appellate Body Reports, *Argentina – Measures Affecting the Importation of Goods*, WT/DS438/AB/R / WT/DS444/AB/R / WT/DS445/AB/R, adopted 26 January 2015
China – GOES (AB)	Appellate Body Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/AB/R, adopted 16 November 2012
China – HP-SSST (Japan) / China – HP-SSST (EU) (AB)	Appellate Body Reports, *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan / China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union*, WT/DS454/AB/R and Add.1 / WT/DS460/AB/R and Add.1, adopted 28 October 2015
China – Raw Materials (AB)	Appellate Body Reports, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, adopted 22 February 2012
China – X-Ray Equipment	Panel Report, *China – Definitive Anti-Dumping Duties on X-Ray Security Inspection Equipment from the European Union*, WT/DS425/R and Add.1, adopted 24 April 2013
EC – Fasteners (China) (AB)	Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R, adopted 28 July 2011
EC – Salmon (Norway)	Panel Report, *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway*, WT/DS337/R, adopted 15 January 2008
EC – Selected Customs Matters (AB)	Appellate Body Report, European Communities – Selected Customs Matters, WT/DS315/AB/R, adopted 11 December 2006
EC – Tube or Pipe Fittings (AB)	Appellate Body Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, adopted 18 August 2003

Korea – Dairy (AB)	Appellate Body Report, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted12 January 2000, as modified by Appellate Body Report WT/DS98/AB/R
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 – Anti-Dumping Measures on Rice (Panel)	Panel Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice*, WT/DS295/R, adopted 20 December 2005, as modified by Appellate Body Report WT/DS295/AB/R
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
US – Products from China (AB)	Appellate Body Report, United States – Countervailing and Anti-Dumping Measures on Certain Products from China, WT/DS449/AB/R and Corr.1, adopted 22 July 2014

1. The summaries of the legal basis of the complaint provided in Japan's panel request seem to reflect to some extent the language contained in the relevant provisions of the Anti-Dumping Agreement. In your view, is a panel request framed in this way "sufficient to present the problem clearly" in the terms of Article 6.2 of the DSU? Otherwise, what would be required to comply with Article 6.2?

2. The Appellate Body has stated, for example in EC – Customs Selected Matters and in China – Raw Materials, that a panel request should explain "how and why the measure at issue is considered by the complaining Member to be violating the WTO obligation in question". The Appellate Body, however, has also noted (for example in EC – Bananas III) that only the claims and not the arguments need to be specified in a panel request. For the purpose of assessing whether a panel request provides a proper description of the claims, which is "sufficient to present the problem clearly", how can a panel differentiate between the explanation of the how and why (which is required) and the provision of legal arguments (which is not required).

1. [U.S. Response to Questions 1 and 2] As the United States has articulated in its Third Party Submission[1], Article 6.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) provides that the panel request shall "identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly." These two distinct requirements – "(i) the identification of the specific measures at issue; and (ii) the provision of a brief summary of the legal basis of the complaint" – "constitute the 'matter referred to the DSB,' which forms the basis of a panel's terms of reference under Article 7.1 of the DSU."[2]

2. The Appellate Body has stated that the "legal basis of the complaint . . . [is] 'the specific provision of the covered agreement that contains the obligation alleged to be violated.'"[3] The identification of the covered agreement provision claimed to have been breached is thus the "minimum prerequisite" for presenting the legal basis of the complaint.[4] Further, the requirement of a "brief summary" sufficient to "present the problem clearly" entails connecting the challenged measure with the obligations alleged to have been infringed.[5] Consequently, "to the extent that a provision contains not one single distinct obligation, but rather multiple obligations, a panel request might need to specify which of the obligations contained in the provision is being challenged."[6]

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[1] U.S. Third Party Submission, Sec. IV.

[2] *Argentina – Import Measures* (AB), para. 5.39.

[3] *China – HP-SSST* (AB), para. 5.14; *US – Products from China* (AB), para. 4.12; *EC – Selected Customs Matters* (AB), para. 130.

[4] *China – HP-SSST* (AB), para. 5.14; *Korea – Dairy* (AB), para. 124.

[5] *China – HP-SSST* (AB), para. 5.15; *China – Raw Materials* (AB), para. 220; *US – Products from China* AB), para. 4.8.

[6] *China – HP-SSST* (AB), para. 5.15; *China – Raw Materials* (AB), para. 220; *US – Products from China* (AB), para. 4.8.

3. However, a panel request is required to identify the *claims* at issue. If a request otherwise complies with the requirements of Article 6.2, it need not also provide argumentation as to why and precisely how a measure breaches the relevant obligation.[7] Thus, to demonstrate that a particular claim falls outside a panel's terms of reference, the responding Member must show that the panel request did not clearly identify the obligation alleged to be breached by the challenged measure.[8]

3. What is the difference between: (a) the requirement for an investigating authority to consider whether subject imports have "explanatory force" for the occurrence of significant price depression or suppression under Article 3.2 of the Anti-Dumping Agreement; and (b) a causation and non-attribution analysis under Article 3.5?

4. The price effects analysis that an investigating authority must consider under Article 3.2 and the causation and non-attribution analysis that it must undertake in Article 3.5 are different in that the inquiry under Article 3.2 concerns the relationship between subject imports and domestic prices whereas the inquiry under Article 3.5 concerns the ultimate question of whether subject imports are causing injury to the domestic industry.

5. Specifically, Article 3.2 requires that an authority "consider" the price effects of relevant imports through three inquiries: price undercutting, price depression, or price suppression.[9] The nature of the "consideration" contemplated in Article 3.2 is informed by Article 3.1, which requires the authority's analysis to be objective and based on positive evidence. Article 3.1 thus provides important context for Article 3.2 and serves to frame the level of scrutiny and analysis required of an authority to meet the obligation to "consider" the price effects of subject imports.

6. Article 3.5, on the other hand, requires an authority to "demonstrate" a causal relationship between subject imports and injury to the domestic industry based on a multifaceted examination of all relevant evidence before the authority.[10] The inquiry under Article 3.2, as well as the impact examination under Article 3.4 are vital to the Article 3.5 determination; this is highlighted by the requirement in the first sentence of Article 3.5 that, in order to make an affirmative finding, investigating authorities must demonstrate that the subject imports are "causing injury '*through* the effects of' dumping [], '{a}s set forth in paragraphs 2 and 4.'"[11]

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[7] *China – HP-SSST* (AB), para. 5.14 (finding that "it is the claims, and not the arguments, that are to be set out in a panel request in a way that is sufficient to present the problem clearly"); *EC – Selected Customs Matters* (AB), para. 153 ("Article 6.2 of the DSU requires that the *claims* – not the *arguments* – be set out in a panel request in a way that is sufficient to present the problem clearly).

[8] *China – HP-SSST* (AB), para. 5.14 ("the reference in Article 6.2 of the DSU to the 'legal basis of the complaint' refers to the claims pertaining to a specific provision of a covered agreement containing the obligation alleged to be violated; and that it is the claims, and not the arguments, that are to be set out in a panel request in a way that is sufficient to present the problem clearly").

[9] *China – GOES* (AB), para. 130.

[10] *China – GOES* (AB), para. 130.

[11] *China – GOES* (AB), para. 128.

7. Both the "consideration" under Article 3.2 and the "demonstration" under Article 3.5 share the overarching requirements of Article 3.1 that they be objective and based on positive evidence. With respect to the Article 3.2 price effects considerations, the inquiry must provide the investigating authorities with a "meaningful understanding of whether subject imports have explanatory force"[12] for price suppression (or depression).[13] With respect to Article 3.5, the examination is broader and any affirmative finding of a causal link between subject imports and injury to the domestic industry must be based on an examination of "all relevant evidence" before the authorities.[14]

4. Is an investigating authority required to establish a link between its consideration of volume and price effects of the dumped imports under Article 3.2 of the Anti-Dumping Agreement and its evaluation of relevant economic factors under Article 3.4? Please explain.

8. As explained in the U.S. Third Party Submission, Article 3.4 requires an investigating authority to examine the "impact" of subject imports on a domestic industry, and not just the state of the industry. As recognized by Articles 3.1 and 3.2 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (AD Agreement), subject imports can influence a domestic industry's performance through volume and price effects. Thus, an authority would need to *consider* the relationship between subject imports – including subject import volume, import price undercutting, and the price depressing or suppressing effects of subject imports – and the domestic industry's performance during the period of investigation.[15]

9. Article 3.4 does not dictate the methodology that should be employed by an authority in conducting its "evaluation" of relevant economic factors.[16] However, a panel must be able to discern that an authority's examination of the impact of the domestic industry is based on positive evidence and an objective examination.[17]

10. The United States reiterates that Article 3.4 requires the authorities to "evaluate" each of the relevant economic factors. Such evaluation does not, in itself, require the investigating authorities to establish a causal link between the subject imports and any injury to the domestic industry. But in conducting an Article 3.5 causation analysis, an investigating authority would be required to establish such a causal link before reaching an affirmative present injury determination.

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[12] 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." *Mexico - Rice* (AB), paras. 163-164. *See also EC – Tube or Pipe Fittings* (Panel), para. 7.226.

[13] *Mexico - Rice* (AB), paras. 201-202; *Mexico – Rice* (Panel), paras. 7.97-7.98

[14] *China – GOES* (AB), para. 147.

[15] *China – GOES (AB)*, para. 149.

[16] *EC – Tube or Pipe Fittings* (AB), para. 131.

[17] *EC – Tube or Pipe Fittings* (AB), para. 130-132.

5. The Appellate Body stated that an investigating authority is required to examine the impact of subject imports on the domestic industry pursuant to Articles 3.4 and 15.4, but is not required to demonstrate that subject imports are causing injury to the domestic industry. What does this mean in terms of what an investigating authority must do in examining the "explanatory force" of dumped imports for the state of the domestic industry as set out by the Appellate Body?

11. In *China – GOES*, the Appellate Body observed that Article 3.4 requires an investigating authority to examine the impact of subject imports on the domestic industry, but does not require it to demonstrate that subject imports are causing injury to the domestic industry.[18]

12. The Appellate Body reasoned that an analysis with respect to the causal relationship is mandated by Article 3.5, under which an investigating authority must examine "all relevant evidence" before it and conduct a non-attribution analysis regarding all factors known to be causing injury to the domestic industry.[19]

13. Notwithstanding the different nature of the Article 3.4 evaluation and the Article 3.5 demonstration, the United States notes that the obligations set out in Articles 3.4 and 3.5 are integrally connected. This is evidenced by the reliance in Article 3.5 on "an examination of all relevant evidence before the authorities" in order to demonstrate "a causal relationship." Therefore, many of factors of the kind listed in Article 3.5 to be considered in addressing non-attribution would constitute "relevant economic factors and indices having a bearing on the state of the [domestic] industry" within the meaning of Article 3.4.

14. Indeed, the Appellate Body in *China – GOES* stated that the inquiry set forth in Article 3.4 is necessary to a determination of the ultimate question in Article 3.5 as to whether subject imports are causing injury to the domestic industry. Thus, the examination under Article 3.4 contributes to the overall determination required under Article 3.5.[20]

6. When is a factor other than the dumped imports allegedly causing injury "known" to the investigating authority? In order for "an other" factor to be known, must the interested parties substantiate assertions in this regard by presenting evidence before the investigating authority? To what extent is an investigating authority required to consider factors other than the dumped imports which may be injuring the domestic industry, in the absence of allegations and evidence submitted by the interested parties?

15. In order to trigger the obligation of an investigating authority under Article 3.5 to examine a "known" factor other than subject imports, the factor at issue must not only be

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[18] *China – GOES* (AB), para. 150.

[19] *China – GOES* (AB), para. 149-150.

[20] *China – GOES* (AB), para. 149-150.

"known" to the investigating authority, but it must also be injuring the domestic industry at the same time as subject imports.[21]

16. The Appellate Body has recognized that the AD Agreement does not expressly state how a factor that is injuring the domestic industry at the same time as subject imports may become "known" to the investigating authority, or if and in what manner it must be raised by interested parties in order to trigger an authority's obligation to conduct a non-attribution analysis.[22] In the United States' view, generally a factor that is injuring the domestic industry at the same time as subject imports would become "known" to the investigating authority because an interested party clearly raised it in comments or argument and submitted or commented on relevant supporting evidence during the investigation.[23]

17. In some circumstances, however, information about a factor that is injuring the domestic industry at the same time as subject imports may not come to light until the investigation is underway. Even in such cases, an interested party would be expected to specifically identify that factor as an "other" factor and present relevant supporting evidence for the investigating authorities to consider in a non-attribution analysis.[24]

7. Once producers of the like product accounting for a major proportion of the total domestic production of that product are included in the definition of the domestic industry, must an investigating authority consider other domestic producers of the like product for inclusion in the domestic industry?

18. Yes. Article 4.1 stipulates that ""domestic industry' shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products."

19. As explained in the U.S. Third Party Submission, consistent with the objectivity and positive evidence requirements of Article 3.1, the domestic industry is to be investigated in an unbiased manner that does not favor the interests of any interested party in the investigation.[25] How an investigating authority chooses to define the domestic industry has repercussions

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[21] *EC – Tube or Pipe Fittings* (AB) at para. 175; *see also China – X-Ray Equipment*, para. 7.265.

[22] *EC – Tube or Pipe Fittings* (AB) at para. 176.

[23] The panel in *China – X-Ray Equipment* stated that if an interested party raises the issue of an "other factor," but fails to provide any supporting evidence that the factor is injuring the domestic industry, it would "be preferable" for an investigating authority to state that the party has not presented such evidence rather than not mentioning the factor at all in its determination. *See China – X-Ray Equipment*, paras. 7.265-7.267.

[24] *See China – X-Ray Equipment*, para. 7.267 (stating that if there is no relevant evidence before an investigating authority to indicate that a factor is injuring the domestic industry, the authority is not required to make a finding regarding whether the factor is indeed causing injury, and subsequently to proceed to conduct a non-attribution analysis).

[25] *US – Hot-Rolled Steel* (AB), para. 193.

throughout the course of the injury analysis and determination; thus, the overarching obligations of Article 3.1 necessarily extend to an authority's definition of the domestic industry.

20. The Appellate Body also has recognized that a proper definition of the domestic industry is critical to ensuring an accurate and unbiased injury analysis.[26] Once an authority has defined the domestic industry, it cannot discount without objective reasons the data provided by certain members of the domestic industry. Outside of a properly conducted sampling of the domestic industry, an investigating authority cannot be said to act in an unbiased manner if it discards data timely provided by particular members of the domestic industry. Doing so might have the effect or risk of introducing distortion to the injury analysis. For example, exclusion of data provided by certain producers from the evaluation might mean that an investigating authority is discarding data showing that the domestic industry is performing favorably, and therefore giving undue weight to data from other producers indicative of a poorer performance.

21. Moreover, the inclusion of as many producers as feasible in the domestic industry definition is supported by the fact that Article 4.1 expressly provides only two circumstances that permit an investigating authority to deliberately exclude producers from the domestic industry definition – one for related producers and one for regional industries. Article 4.1 does not authorize investigating authorities to intentionally limit the definition of the domestic industry to identified producers who account for a particular proportion of total production, to the exclusion of other domestic producers who may be willing to cooperate with the investigation.[27]

8. Does a violation of Articles 3.1, 3.2, 3.4, 3.5, 4.1, 6.5, 6.5.1, 6.9, 12.2., and 12.2.2, if established, give rise to a violation of Article VI of GATT 1994? How would, in your view, a violation of each of these provisions separately give rise to a violation of Article VI of GATT 1994. In each, case, what specific part of Article VI would be violated?

22. Japan has requested the Panel to find the measures at issue to be inconsistent with Article VI of the *General Agreement on Tariffs and Trade 1994* (GATT 1994) "as a consequence of the inconsistencies with the Anti-Dumping Agreement" as described in its submission.[28] Japan raised no new arguments specific to Article VI of the GATT 1994. The United States submits that the Panel need not make any findings with respect to Article VI of the GATT because such findings would not contribute to the resolution of the dispute between the parties.

23. Article 3.4 and Article 3.7 of the DSU provide, respectively, that "[r]ecommendations or rulings of the DSB shall be aimed at achieving a satisfactory settlement of the matter" and that "the aim of the dispute settlement mechanism is to secure a positive solution to a dispute." Pursuant to Articles 7.1 and 11 of the DSU, panels and the Appellate Body are charged with making those findings that may lead to such a recommendation. Given the findings requested by

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[26] *EC – Fasteners* (China) (AB), para. 414.

[27] *EC – Salmon* (Panel), para. 7.112 ("However, nothing in the text of Article 4.1 gives any support to the notion that there is any other circumstance in which the domestic industry can be interpreted, from the outset, as not including certain categories of producers of the like product, other than those set out in that provision. . . .").

[28] Japan's First Written Submission, paras. 318-319.

Japan under Article VI of the GATT 1994 are purely consequential, additional findings would not affect the DSB's recommendations and rulings, and the Panel therefore should exercise judicial economy with respect to those claims.