European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China:

Recourse to Article 21.5 of the DSU by China

(AB-2015-7 / DS397)

Third Participant Oral Statement
of the United States of America

November 10, 2015

Mr. Chairman, members of the Division:

1. The United States appreciates the opportunity to provide our views as a third participant in this dispute. The U.S. third participant submission addressed issues regarding the treatment of business confidential information and the determination of the margin of dumping. In our statement today, the United States will address issues involving the authorities' determination of injury, and in particular, issues involving the Panel's findings that the European Union (EU) acted inconsistently with Articles 4.1[1] and 3.1[2] of the AD Agreement.[3]

2. Article 3.1 of the AD Agreement provides that a determination of injury by an investigating authority "shall be based on positive evidence and involve an objective examination." For the purpose of examining issues regarding the selection of the domestic producers examined by the authority, the phrase "objective assessment" is especially important. As the Appellate Body found in *United States – Hot-Rolled Steel*, Article 3.1 of the AD Agreement obliges investigating authorities to conduct antidumping investigations "in an unbiased manner, without favoring the interests of any interested party, or group of interested parties, in the investigation."[4] The United States thus considers legally sound the Panel's finding that an investigating authority acts inconsistently with Article 3.1 if its approach to defining the domestic industry imposes a "self-selection" bias.[5]

3. Furthermore, were the facts to demonstrate that the European Union stipulated that only domestic producers expressing a wish to be included in the injury sample would be examined for the purposes of assessing impacts of dumped imports on the domestic industry, the United States considers that the Panel would be correct in finding that the investigating authority encouraged a self-selection bias that improperly increased the likelihood of an affirmative injury determination.[6]

4. The problem with such an approach is that it would tend to discourage healthier producers from responding to the authority's notice of initiation, thus making it more likely that weaker producers would be disproportionately represented among the producers that did respond. This is because the weakest domestic producers would have had the most to gain from the imposition of antidumping duties on imported fasteners, and would therefore have had the

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[1] Panel Report, *EC – Fasteners* (Article 21.5 – China), para. 7.299.
[2] Panel Report, *EC – Fasteners* (Article 21.5 – China), para. 7.299.
[3] *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement").
[4] *U.S. – Hot-Rolled Steel (AB)*, para. 193. *See also*, *Mexico – Rice (AB)*, paras. 183, 187-188 (affirming the panel's finding that the Mexican investigating authority had acted inconsistently with the objectivity requirement under Article 3.1 of the AD Agreement by predicating its injury determination on data from only the first six months of each of the three years examined, which petitioners had advocated as the period in which import penetration was highest).
[5] *See* Panel Report, *EC – Fasteners* (Article 21.5 – China), para. 7.299.
[6] *See EC – Fasteners (AB)*, para. 426 ("Further, we consider that a domestic industry definition based on a self-selection which introduced a material risk of distortion to the IA's injury analysis would necessarily render the resulting injury determination inconsistent with the obligation to make an objective injury analysis based on positive evidence laid down in Article 3.1 of the AD Agreement.").

greatest incentive to participate in the injury investigation by (1) responding to the notice of initiation and (2) expressing a desire to be included in the sample.[7]

5. Conversely, stronger domestic producers would have little incentive to respond to the investigating authority's notice, much less express a desire to be included in the injury sample. Indeed, the strongest domestic producers would have every incentive to *withhold* their performance data from the authority. This is because an injury sample comprised of relatively weaker producers would increase the likelihood of an affirmative injury determination (as compared to a sample that included *all* domestic producers), and thereby justify higher duties on competing imported products.

6. We understand the EU's primary defense to these common sense concerns to be an attempt to rely on language in the Appellate Body report in the original dispute. In particular, the EU relies on the statement that the EC had introduced "a material risk of distorting the injury determination" by "*exclud[ing]* producers that provided relevant information" from the domestic industry definition.[8] On this basis, the EU contends that the Commission's redetermination was no longer inconsistent with obligations under the AD Agreement because the Commission had not excluded any "European producers that had come forward" in response to the notice of initiation.[9]

7. The EU relies on an overly narrow reading of the Appellate Body's findings in the original dispute. Simply put, the legal problems identified by the Appellate Body went beyond the Commission's selective *exclusion* of certain producers from the injury sample. Indeed, the Appellate Body discerned a self-selection problem with the Commission's approach in the original investigation. Specifically, the Appellate Body observed that "by defining the domestic industry on the basis of willingness to be included in the sample, the Commission's approach imposed a self-selection process among the domestic producers that introduced a material risk of distortion."[10]

8. The EU's reliance on the findings in *U.S. – Offset Act (Byrd Amendment)* is also misplaced. In that dispute, the Appellate Body found that a domestic producer's motivation for supporting a petition is not relevant to an investigating authority's assessment of industry support under *Article 5.4* of the AD Agreement.[11] That dispute did not include findings relating to the provisions at issue in this dispute, namely, Articles 3.1 and 4.1 of the AD Agreement.

9. For the foregoing reasons, the Panel properly considered whether the European Commission's domestic industry definition in its redetermination "continued to suffer from a self-selection process that introduced a material risk of distortion" in contravention of Articles 4.1 and 3.1 of the AD Agreement.

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[7] EU Appellant Submission, para. 415.
[8] *See* EU Appellant Submission, paras. 405, 409-10.
[9] *See* EU Appellant Submission, para. 393; Panel Report, *EC – Fasteners* (Article 21.5 – China), para. 7.295 (emphasis added).
[10] *EC – Fasteners (AB)*, para. 427.
[11] *U.S. – Offset Act (Byrd Amendment) (AB)*, paras. 281-92.

10. We thank the Division for its attention and look forward to discussing these and other matters in the course of this hearing.