CHINA – ANTI-DUMPING MEASURES ON IMPORTS OF CELLULOSE PULP FROM CANADA

(DS483)

RESPONSES OF THE UNITED STATES OF AMERICA
TO THE PANEL'S QUESTIONS TO THE THIRD PARTIES

May 31, 2016

TABLE OF REPORTS

SHORT TITLE	FULL CASE TITLE AND CITATION
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
Thailand – H-Beams (AB)	Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, adopted 5 April 2001

QUESTIONS FOR THE THIRD PARTIES

1. **The text of Article 3.2 referring to the volume of dumped imports says "either ... or … or". This seems to strongly suggest that there is no obligation to look at all perspectives. Canada argues in para. 70 of its first written submission that the volume analysis needs to be broad and contextual. Do you agree with Canada's view in this regard? If you do, do you take the view that an investigating authority is obligated to look at more than one of the listed perspectives?**
2. **Is an investigating authority required to take into account the factors suggested by Canada's argument, e.g. trends in domestic demand, domestic like product volumes and non-dumped import volumes, in its consideration of the volume of dumped imports in order to comply with the first sentence of Article 3.2? Please specify the legal basis for your view.**

1. The United States will provide a combined response to Questions 1 and 2. Under the text of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "AD Agreement"), a difference exists between the volume consideration in the first sentence of Article 3.2, and the consideration, under Articles 3.4 and 3.5, of whether there is a causal relationship between subject imports and the state of the domestic industry. With regard to the application of the first sentence of Article 3.2, the use of the word "or" indicates that for this element of the analysis, an absolute increase could suffice. In particular, Article 3.2 states that "the investigating authorities shall consider whether there has been a significant increase in dumped imports, *either* [1] in absolute terms *or* [2] relative to production *or* [3] consumption in the importing Member."[1] As these three methods of measuring change in volume are expressed in the alternative, in any particular investigation, Article 3.2 does not require an investigating authority to consider volume in all three contexts if the authority considers volume to be significant in one of the contexts. With respect to the factors listed in Question 2, such factors would, if relevant, fall within the parameters of Articles 3.4 and 3.5, which, respectively require investigating authorities to evaluate "all relevant economic factors having a bearing on the state of the industry" and, among other things, to assure that they are not attributing injuries caused by other known factors (such as non-dumped imports or contraction of demand) to the subject imports.

3. **Is an investigating authority required to make any specific statement as to the "significance" of any increase in imports in order to comply with the first sentence of Article 3.2? Please specify the legal basis for your view.**

2. As explained below, Article 3.2 does not require an investigating authority to make specific statements regarding "significance." However, the authority's consideration of the significance of the increase in dumped imports must be reflected in relevant documentation.

3. The first sentence of Article 3.2 provides in relevant part that "the investigating authorities shall consider whether there has been a significant increase in dumped imports . . . ." The Appellate Body explained in *China – GOES* that "[t]he notion of the word 'consider', when cast as an obligation upon a decision maker, is to oblige it to *take something into account* in

[1] Emphasis added.

reaching its decision."[2] The Appellate Body further explained that Article 3.2 does "not impose an obligation on an investigating authority to make a definitive determination on the volume of subject imports"[3] but "an investigating authority's *consideration* under Articles 3.2 and 15.2 must be reflected in relevant documentation."[4] The Appellate Body has also found that the word "significant" does not necessarily need to appear in the text of the relevant document.[5]

4. The Panel is interested in your views as to how the analysis of import volume under Article 3.2 suggested by Canada correlates with an investigating authority's obligations under Article 3.4 and Article 3.5. We recall that Article 3.5 itself refers to Article 3.2 as "setting forth" the effects of dumping through which injury is caused. Doesn't the contextual analysis suggested by Canada imply that some type of "mini-causation" analysis is required in the context of Article 3.2? If not, how is the analysis proposed by Canada different from the analysis of causation under Article 3.5?

4. As noted in the U.S. response to Questions 1 and 2, the AD Agreement contains a distinction between the volume analysis required under the first sentence of Article 3.2, and the analysis required under Articles 3.4 and 3.5. Accordingly, the United States does not agree that any kind of "mini-causation" analysis is required in connection with the consideration of the volume of dumped imports under the first sentence of Article 3.2. With respect to volume, Article 3.2 requires an investigating authority to consider a single question: whether there has been a significant increase in subject imports when viewed in any of several possible contexts. Articles 3.4 and 3.5, on the other hand, respectively address the multifaceted relationship among "all relevant factors having a bearing on the state of the [domestic] industry" and predicate an affirmative determination on "[t]he demonstration of a causal relationship between the dumped imports and the injury to the industry. . . based on an examination of all relevant evidence before the authorities."

5. Similarly, the Panel is interested in your views as to how the impact analysis under Article 3.4 suggested by Canada correlates with an investigating authority's obligations under Article 3.5. Again, we recall that Article 3.5 refers to Article 3.4 as "setting forth" the effects of dumping through which injury is caused. Canada argues, at para. 47 of its first written submission, that MOFCOM acted inconsistently with Articles 3.1 and 3.4 of the AD Agreement because it "failed to objectively examine the positive evidence regarding the other factors explaining the state of the domestic industry." Doesn't this suggest that a "mini-causation" analysis, including consideration of non-attribution, is required in the context of Article 3.4? If not, how is what Canada suggests is required different from the analysis of causation and non-attribution under Article 3.5?

5. The United States first recalls that all aspects of an injury determination are subject to the overarching principles, under Article 3.1, that a final injury determination be based on positive

[2] *China – GOES (AB)*, para. 130 (emphasis in original, footnote omitted).
[3] *China – GOES (AB)*, para. 130 (emphasis in original).
[4] *China – GOES (AB)*, para. 131 (emphasis in original).
[5] *Thailand – H-Beams (AB)*, para. 139.

evidence and involve an objective examination of the facts. These principles inform the more detailed obligations in the succeeding paragraphs of Article 3.[6]

6. In the United States' view, the obligations set out in Articles 3.4 and 3.5 are integrally connected, as 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." Indeed, most of the examples of factors 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" per Article 3.4.

6. Citing the Appellate Body Reports in *China – HP-SSST* (paras. 5.140 and 5.203) and *China – GOES* (para. 128) Canada refers, at para. 56 of its first written submission, to the paragraphs of Article 3 "forming a "logical progression" for the investigating authority to follow in order to answer the "ultimate question" in Article 3.5 of whether dumped imports are causing material injury to the domestic industry." The Panel is interested in the views of the third parties as to how to understand the "logical progression" referred to.

i. Is it your view that an investigating authority must consider the elements in Articles 3.2 and 3.4 in the order in which they are listed, before addressing causation under Article 3.5?

ii. What in your view would be the impact of an investigating authority considering that there is no significant increase in imports, either in absolute or relative terms? Would this mean that the investigating authority could not go on to consider price effects and impact under the second sentence of Article 3.2 and Article 3.4? What if the investigating authority considered that there was a significant increase in imports, but that there was no significant price undercutting, and that the effect of such imports was not otherwise to depress prices or prevent price increases to a significant degree?

iii. Please explain your views with specific reference to the instruction in the last sentence of Articles 3.2 and 3.4 that no one or several of the factors listed in those Articles can necessarily give decisive guidance. To what, in your view, do the listed factors give guidance?

7. In the United States' view, an investigating authority is required to consider and examine all of the factors listed in the provisions of Article 3, and to carry out the obligations contained therein, in a manner consistent with the overarching obligations of Article 3.1. To that end, the AD Agreement does not set out a specific sequence in which these considerations and examinations must occur.

8. The United States observes that it may not be logical to interpret Article 3 to require consideration of each element in the order listed. For example, there is no reason to examine the economic factors and indices provided in Article 3.4 in the order in which they are listed.

[6] *E.g.*, *Thailand – H Beams (AB)*, para. 106.

Further, in an investigation involving imports from more than one country, an authority would need to consider whether a cumulative assessment of the imports is appropriate under Article 3.3 before considering the volume and price effects of the subject imports under Article 3.2. In this instance, therefore, it would not be logical to consider the elements of Article 3.2 before conducting the analysis called for by Article 3.3.

9. The obligations to consider price effects, in Article 3.2, and the impact of dumped imports on the domestic industry, in Article 3.4, are not contingent on whether an investigating authority considers a volume increase to be significant. Thus, even if an investigating authority considers that there is no significant increase in subject imports, either in absolute or relative terms, the authority must consider price effects and impact. For the same reason, in the scenario described in the third sentence of question 6(ii), an authority must proceed to consider the impact of the dumped imports, under Article 3.4.

10. The last sentences of Articles 3.2 and 3.4 recognize that an authority should weigh the evidence developed in an investigation based on the particular conditions of the industry being investigated and the conditions of competition in which that industry operates, and that some of the factors discussed may be more important in certain investigations than in others. These sentences also underscore that authorities should consider and examine *all* of the relevant evidence in an investigation, and not give undue weight to isolated factors.