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

(DS483)

THIRD PARTY SUBMISSION
OF THE UNITED STATES OF AMERICA

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I. INTRODUCTION

1. The United States welcomes the opportunity to present its views in this proceeding on *China – Anti-Dumping Measures on Imports of Cellulose Pulp from Canada* (DS483). In this submission, the United States will present its views on the proper legal interpretation of certain provisions of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "AD Agreement") as relevant to certain issues in this dispute.

II. CANADA'S CLAIMS REGARDING ARTICLE 3 OF THE AD AGREEMENT

A. Canada's Claims Regarding Price Effects under Articles 3.1 and 3.2 of the AD Agreement

2. Canada claims that the finding of price depression by the Ministry of Commerce of the People's Republic of China ("MOFCOM") is inconsistent with Articles 3.1 and 3.2 of the AD Agreement.[1] MOFCOM concluded that the pricing of subject imports depressed the prices of the domestic like product.[2] Canada argues that MOFCOM failed to make an objective examination based on positive evidence when considering price depression.

3. Specifically, Canada argues that, in making its price depression finding, MOFCOM failed to: (i) explain the relevance of alleged parallel pricing trends between subject imports and the domestic like product to the price depression finding[3]; (ii) address evidence that subject imports were priced higher than the domestic like product[4]; (iii) consider evidence that the market share of subject imports remained stable while the domestic like product gained market share[5]; and (iv) refer to positive evidence that subject imports depressed prices of the domestic like product.[6]

4. China argues that MOFCOM's price depression finding is the result of an objective examination based on positive evidence consistent with Articles 3.1 and 3.2.[7] China alleges that Canada is asking the Panel to substitute its own views for that of the investigating authority.[8]

5. The United States takes no position on the merits of Canada's claims related to MOFCOM's price depression finding, but offers the following comments on the applicable legal obligations of Articles 3.1 and 3.2 of the AD Agreement.

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[1] Canada's First Written Submission, para. 77.

[2] Canada's First Written Submission, para. 78.

[3] Canada's First Written Submission, para. 81.

[4] Canada's First Written Submission, paras. 88-94.

[5] Canada's First Written Submission, paras. 95-100.

[6] Canada's First Written Submission, paras. 101-103.

[7] China's First Written Submission, para. 61.

[8] China's First Written Submission, para. 63.

6. The United States agrees with Canada and China that the obligations of Article 3.2 of the AD Agreement must be considered in conjunction with the overarching principles of Article 3.1 of that Agreement.[9] Article 3.1 of the AD Agreement provides that:

> 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.

7. Thus, Article 3.1 of the AD Agreement sets forth two overarching obligations that apply to multiple aspects of an authority's injury determination. The first overarching obligation 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."[10] 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."[11] The plain text of Article 3.1 makes clear that these obligations extend to an authority's price effects analysis.[12]

8. Article 3.2 of the AD Agreement outlines the examination that authorities must conduct to determine the price effects of dumped imports on the domestic market. Article 3.2 of the AD Agreement states:

> [w]ith regard to the effect of dumped imports on prices, the investigating authorities shall consider whether [1] there has been significant price undercutting by the dumped imports as compared with the price of a like product of an importing Member, or whether the effect of such imports is to [2] depress prices to a significant degree or [3] prevent price increases, which otherwise would have occurred, to a significant degree.

The text contemplates three inquiries with regard to the effects of dumped imports on prices: price undercutting, price depression and price suppression.[13]

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[9] Canada's First Written Submission, para. 62 (citing *China – GOES (AB)*, para. 130); China's First Written Submission, para. 39 (citing *China – GOES (AB)*, para. 130).

[10] *Mexico – Anti-Dumping Measures on Rice (AB)*, paras. 163-164. *See also EC – Tube and Pipe Fittings (AB)*, para. 7.226.

[11] *Mexico – Anti-Dumping Measures on Rice (AB)*, para. 180.

[12] *China – GOES (AB)*, para. 130; *see also id.*, para. 201 ("[A] price effects finding is subject to the requirement that a determination of injury be based on 'positive evidence' and involve an 'objective examination.'").

[13] *China – HP-SSST (Japan) / China – HP-SSST (EU) (AB)*, para. 5.155.

9. The United States observes that Article 3.2 requires that an authority "consider" the volume and price effects of the relevant imports. The United States recalls that the Appellate Body in *US – GOES* found that Article 3.2 does not require an authority "to make a *definitive determination*" on price effects, recognizing the distinction between use of the verb "consider" in Article 3.2 of the AD Agreement and the verb "demonstrate" in Article 3.5.[14] However, the fact that no definitive determination is required "does not diminish the scope of *what* the investigating authority is required to consider."[15] The Appellate Body has explained that the inquiry must provide the authority with a "meaningful understanding of whether subject imports have explanatory force"[16] for price depression or suppression, and, as required by Article 3.1, that understanding must be based on positive evidence and an objective examination.

10. In assessing price depression or suppression, the authority may not confine its consideration to an analysis of domestic prices. Rather, the plain text of Article 3.2 envisions an inquiry into the relationship between subject imports and domestic prices. Article 3.2 introduces the obligations on price effects by clarifying that the nature of the inquiry is to understand the "effect of the dumped imports on prices."[17] An authority's analysis of the three delineated price effects – price undercutting, price depression, and price suppression – must necessarily be in reference to the dumped imports.

11. The Appellate Body has endorsed this interpretation that it is not enough for an authority to simply observe what is happening to domestic prices. The Appellate Body described the "type of link contemplated by the term 'the effect of' under Articles 3.2 and 15.2" as follows:

> The language of Articles 3.2 and 15.2 thus expressly link significant price depression and suppression with subject imports, and contemplates an inquiry into the relationship between two variables, namely, subject imports and domestic prices. More specifically, an investigating authority is required to consider whether a first variable – that is, subject imports – has explanatory force for the occurrence of significant depression or suppression of a second variable – that is, domestic prices.[18]

12. Although the United States does not address the factual underpinnings of MOFCOM's cellulose pulp injury determination, the United States recalls that prior panels and the Appellate Body have considered the analysis by investigating authorities under Articles 3.1 and 3.2 of pricing parallels between subject imports and domestic like products, and of overselling by subject imports.[19] The Appellate Body in *China – GOES* explained that Article 3.2 requires an

[14] *China – GOES (AB)*, para. 130.

[15] *China – GOES (AB)*, para. 131 (emphasis in original).

[16] *China – GOES (AB)*, para. 144.

[17] AD Agreement, Article 3.2.

[18] *China – GOES (AB)*, para. 149.

[19] *See, e.g., China – Autos (US) (Panel)*, paras. 7.258 - 7.267 (MOFCOM's analysis of alleged parallel pricing fails to reflect an objective examination based on positive evidence of the prices of subject imports and the domestic like product), 7.268-7.275 (MOFCOM's final determination of price depression fails to reflect an objective examination of the evidence of overselling by the subject imports); and *China – GOES (AB)*, paras. 208-210 (finding no basis to fault the panel for failing to discuss alleged parallel pricing trends where MOFCOM failed to provide

investigating authority in its final determination to provide sufficient reasoning as to what explanatory force parallel pricing trends have for the depression or suppression or domestic prices.[20]

13. As China has observed, the AD Agreement does not prescribe a particular methodology to be used in an investigating authority's price effects analysis. Nevertheless, Article 3.2 does set certain parameters for how the analysis is to be performed, as elaborated above. Based on these parameters, the Panel must evaluate whether the investigating authority provided a reasoned and adequate explanation as to how the evidence on the record supported its factual findings, and how those factual findings supported the overall determination of price depression.

B. Canada's Claims Regarding Articles 3.1 and 3.4 of the AD Agreement

14. Canada claims that MOFCOM's examination of the domestic industry is inconsistent with Articles 3.1 and 3.4 of the AD Agreement because MOFCOM failed to objectively examine whether subject imports explained the state of the domestic industry,[21] failed to objectively examine the domestic industry's market share[22] and failed to consider data showing an improvement in the state of the domestic industry.[23]

15. China argues that MOFCOM properly examined the relevant injury factors, as well as whether the subject imports explained the state of the domestic industry.[24] With respect to Canada's argument that MOFCOM failed to objectively examine the domestic industry's market share, China alleges that Canada's understanding is due to an error in Canada's translation of the final determination.[25]

16. The United States, again, takes no position on the parties' factual arguments, but offers the following views on the appropriate legal interpretation of Articles 3.1 and 3.4.

17. As with Article 3.2 of the AD Agreement, the Appellate Body has recognized that it is appropriate to read the obligations of Article 3.4 in conjunction with Article 3.1 of the AD Agreement.[26] Accordingly, any determinations or findings made in connection with Article 3.4 must be based on "positive evidence" and "involve an objective examination," as required by Article 3.1 of the AD Agreement.

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sufficient reasoning in its final determination as to what explanatory force the alleged trends had for price depression or suppression).

[20] *China – GOES (AB)*, para. 136.

[21] Canada's First Written Submission, paras. 110-111.

[22] Canada's First Written Submission, paras. 112-114.

[23] Canada's First Written Submission, paras. 115-120.

[24] China's First Written Submission, paras. 107, 117.

[25] China's First Written Submission, para. 109.

[26] *China – GOES (AB)*, para. 126 (citing *Thailand – H-Beams (AB)*, para. 106).

18. Article 3.4 of the AD Agreement sets out an authority's obligation to ascertain the impact of dumped imports on the domestic industry. The article provides that "[t]he examination of the impact of dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry" and enumerates certain factors that an authority must include in its evaluation. The United States observes that Article 3.4 imposes an obligation on the authority to conduct an "examination" of the impact of the dumped imports on the domestic industry. And the text of Article 3.4 expressly requires investigating authorities to examine the "impact" of subject imports on a domestic industry, and not just the state of the industry.

19. As recognized by Articles 3.1 and 3.2 of the AD Agreement, subject imports can influence a domestic industry's performance through volume and price effects. Thus, to examine the impact of subject imports on a domestic industry, an authority would need to consider the relationship between subject imports – including subject import price undercutting, and the price depressing or suppressing effects of subject imports – and the domestic industry's performance during the period of investigation.

20. This interpretation is supported by the Appellate Body's observations in *China – GOES*:

> Articles 3.4 and 15.4…do not merely require an examination of the state of the domestic industry, but contemplate that an investigating authority must derive an understanding of *the impact of* subject imports on the basis of such an examination. Consequently, Articles 3.4 and 15.4 are concerned with the relationship between subject imports and the state of the domestic industry, and this relationship is analytically akin to the type of link contemplated by the term "the effect of" under Articles 3.2 and 15.2.[27]

21. Thus, as both Canada[28] and China[29] observe, in examining "the relationship between subject imports and the state of the domestic industry"[30] pursuant to Article 3.4 of the AD Agreement, an authority must consider whether changes in the state of the industry are the consequences of subject imports and whether subject imports have explanatory force for the industry's performance trends. The "examination" contemplated by Article 3.4 must be based on a "thorough evaluation of the state of the industry" and it must "contain a persuasive explanation as to how the evaluation of relevant factors led to the determination of injury."[31]

22. Article 3.4 does not dictate the methodology that should be employed by the authority, or the manner in which the results of this evaluation are to be set out.[32] However, the United States

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[27] *China – GOES (AB)*, para. 149.

[28] Canada's First Written Submission, para. 108.

[29] China's First Written Submission, para. 100.

[30] *China – GOES (AB)*, para. 149.

[31] *Thailand – H-Beams (Panel)*, para. 7.236.

[32] *EC – Tube or Pipe Fittings (AB)*, para. 131. Indeed, in that dispute, an internal "note for the file" setting out the European Commission's consideration of some of the injury factors listed in Article 3.4 was found to satisfy the requirements of Articles 3.1 and 3.4 of the AD Agreement. *Id*. at paras. 119 and 133.

observes that the Panel must be able to discern that the authority's examination of the impact on the domestic industry – an examination that necessarily includes an evaluation of relevant economic factors – is based on positive evidence and an objective examination.

C. Canada's Claims Regarding Articles 3.1 and 3.5 of the AD Agreement

23. Canada claims that MOFCOM's causation analysis is inconsistent with Articles 3.1 and 3.5 of the AD Agreement because MOFCOM relied on deficient volume and price effects findings and failed to objectively examine the causal relationship between dumped imports and injury to the domestic industry.[33] Canada further alleges that MOFCOM failed to objectively examine based on positive evidence whether any other known factors were the cause of injury to the domestic industry.[34]

24. China argues that MOFCOM properly relied on its volume and price effects findings and properly examined the causal relationship between subject imports and injury to domestic industry.[35] China also contends that MOFCOM properly included an analysis of all relevant known factors other than dumped imports contributing to injury to the domestic industry.[36]

25. Article 3.5 states:

> It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of the Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports. Factors 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.[37]

26. As with Articles 3.2 and 3.4 of the AD Agreement, the Appellate Body has recognized that it is appropriate to read the obligations of Article 3.5 in conjunction with Article 3.1 of the AD Agreement.[38] That is, any determinations or findings made in connection with Article 3.5

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[33] Canada's First Written Submission, para. 125.

[34] Canada's First Written Submission, para. 140.

[35] China's First Written Submission, paras. 124-125.

[36] China's First Written Submission, para. 135.

[37] AD Agreement, Art. 3.5 (emphasis in original).

[38] *China – GOES (AB)*, para. 126 (citing *Thailand – H-Beams (AB)*, para. 106).

must be based on "positive evidence" and "involve an objective examination," as required by Article 3.1 of the AD Agreement.

27. As Canada observes, Article 3.5 of the AD Agreement involves a two-part analysis: (1) an authority's demonstration that dumped imports are causing injury to the domestic industry ("causation"); and (2) an authority's examination of known factors other than dumped imports that could be the cause of injury to the domestic industry ("non-attribution").[39] The United States addresses each part of the analysis in turn.

1. An Inconsistency with Article 3.2 of the AD Agreement Can, Under Certain Circumstances, Produce a Finding of Causation Inconsistent with Article 3.5 of the AD Agreement

28. The United States does not take a position on Canada's claims that MOFCOM's findings on volume and price depression are inconsistent with Article 3.2 of the AD Agreement. With respect to the interpretation of Articles 3.2 and 3.5, however, the United States agrees with Canada's argument that a deficient volume or price effects analysis could compromise a causation analysis where the findings on volume or price effects serve as a key element of the causation analysis. As the Appellate Body explained in *China – GOES*, the provisions in Article 3 "contemplate a logical progression in an authority's examination leading to the ultimate injury and causation determination."[40] Fatal deficiencies in a volume or price effects analysis could compromise the objective nature of the causation analysis.

29. The first sentence of Article 3.5 sets out the general requirement for a demonstration that dumped imports are causing injury under the AD Agreement, and contains an explicit link back to Articles 3.2 (volume and price effects) and 3.4 (impact on domestic industries). If the volume or price effects findings are found to be inconsistent with Articles 3.1 and 3.2, or the impact findings are found to be inconsistent with Articles 3.1 and 3.4, an Article 3.5 causal link analysis relying on such findings would fail. That is, if an authority relies on a volume or price effects finding to support its impact and injury determinations, its decision must be supported by positive evidence on these counts. In such circumstances, a failure to demonstrate volume or price effects or significant impact would constitute a failure to demonstrate that dumped imports are causing injury, as required by the first sentence of Article 3.5 of the AD Agreement.

30. As the panel in *China – Autos (US)* explained "it would be difficult, if not impossible, to make a determination of causation consistent with the requirements of Articles 3 and 15 of the Anti-Dumping and SCM Agreements, respectively, in a situation where an important element of that determination, the underlying price effects analysis, is itself inconsistent with the provisions of those Agreements."[41] The panel properly recognized that a final injury determination is the product of multiple intermediate determinations, each of which must be supported by positive evidence and an objective examination.

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[39] Canada's First Written Submission, paras. 122-123.

[40] *China – GOES (AB)*, para. 143.

[41] *China – Autos (US) (Panel)*, para. 7.327.

2. Article 3.5 of the AD Agreement Requires an Authority to Examine Known Factors Which at the Same Time Were Injuring the Domestic Industry

31. The third sentence of Article 3.5 of the AD Agreement provides that, in addition to examining the effects of the dumped imports, an authority must examine other known factors which at the same time are injuring the domestic industry. As the Appellate Body has found, if a known factor other than dumped imports is a cause of injury, the third sentence of Article 3.5 requires the authority to engage in a non-attribution analysis to ensure that the effects of that other factor are not attributed to the dumped imports.[42] If there are no known factors other than the dumped imports that are injuring the domestic industry, Article 3.5 does not require an authority to conduct a non-attribution analysis. Indeed, in such circumstances, the authority can appropriately attribute all injury to the dumped imports.

32. The AD Agreement does not specify the particular methods and approaches an authority may use to conduct a non-attribution analysis.[43] The question of whether an investigating authority's analysis is consistent with Article 3 should turn on whether the authority has in fact evaluated these factors and whether its evaluation is supported by positive evidence and reflects an objective examination, as required by Article 3.1.[44]

33. The United States takes no position on Canada's factual assertions regarding MOFCOM's analysis under Article 3.5. Based on the above discussion of the applicable provisions, however, the United States observes that the Panel must determine whether the investigating authority demonstrated that it examined other "known factors" within the meaning of Article 3.5 of the AD Agreement, and based its causation analysis on an objective examination of all relevant evidence.

III. CONCLUSION

34. The United States appreciates the opportunity to submit its views in connection with this dispute on the proper interpretation of relevant provisions of the AD Agreement.

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[42] *US – Tyres (AB)*, para. 252.

[43] *US – Hot-Rolled Steel (AB)*, para. 224; *see also US – Tyres (AB)*, para. 252 (stating, in safeguard proceedings conducted under the China Accession Protocol, "[t]he extent of the analysis of other causal factors that is required will depend on the impact of the other factors that are alleged to be relevant and the facts and circumstances of the particular case").

[44] *EC – Countervailing Measures on DRAM Chips (Panel)*, paras. 7.272-7.273 (citing *US-Hot-Rolled Steel (AB)*, paras. 192-193).