EUROPEAN COMMUNITIES – DEFINITIVE ANTI-DUMPING MEASURES ON CERTAIN IRON OR STEEL FASTENERS FROM CHINA

(WT/DS397)

EXECUTIVE SUMMARY OF THIRD PARTY SUBMISSION OF THE UNITED STATES

March 1, 2010

1. The United States addresses in this submission the proper interpretation of the following provisions: (1) Article 6.10 and Article 9 of the *Agreement on Article VI of the General Agreement on Tariffs and Trade 1994* (the "AD Agreement"); (2) Article X:3(a) of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994"); (3) Article 5.4 of the AD Agreement; (4) Articles 2.1 and 2.6 of the AD Agreement; (5) Article 3.1 of the AD Agreement; and (6) Articles 6.1.1, 6.2, 6.4, and 6.5 of the AD Agreement.

I. Article 9(5) of Council Regulation No. 1225/2009 Under the AD Agreement

A. Article 6.10 of the AD Agreement

2. According to China, Article 6.10 of the AD Agreement requires an investigating authority to calculate an individual margin of dumping for every interested party that identifies itself as an exporter or producer. China misunderstands the obligations found in Article 6.10 of the AD Agreement.

3. The United States notes that the AD Agreement neither defines "exporter" or "producer", nor sets out criteria for the investigating authority to examine before concluding that a particular firm or group of firms constitutes an "exporter" or "producer." Therefore, an investigating authority is permitted to conclude, based on the facts on the record, which entities constitute an individual "producer" or "exporter" as a condition *precedent to* calculating an individual dumping margin. This includes the right of the investigating authority to establish those factors that may be relevant to identifying an "exporter" or "producer," including by reference to the actual commercial activities and relationships of companies rather than their status as legally distinct entities. The reasoning of the panel in *Korea – Paper* directly supports this interpretation of Article 6.10 of the AD Agreement.

4. An inquiry into the relationship between companies and the reality of their respective commercial activities is particularly relevant in the context of producers and exporters from a non-market economy. In a non-market economy, such as China, the government's interference in the functioning of market principles could lead to the government making business decisions for the individual companies, the government forcing the companies to harmonize their business activities to fulfill the government's objectives, or the government shifting production between the companies. Consistent with the panel report in *Korea – Paper*, each of these factors would support a finding by the investigating authority that companies should be treated as a single exporter and subject to a single dumping margin.

5. Furthermore, given the presumption of government interference reflected in paragraph 15 of Part I of the *Protocol of the Accession of the People's Republic of China* ("Protocol"), it would make little sense for an investigating authority to assign an individual dumping margin to an exporting company in a non-market economy country without first confirming, at the very least, that the company functions as an exporter separate from the government. Otherwise, if the exporter's prices were set by the government, there would be no objective basis for assigning that company its own dumping margin.

B. Article 9 of the AD Agreement

6. As an initial matter, the United States notes that Article 9 discusses the *imposition* of antidumping duties with respect to *products*, not individual exporters or producers. In this regard, the concept of *imposing* antidumping duties on an individual exporter or producer, as advanced by China, is found nowhere in Article 9 of the AD Agreement.

7. Furthermore, it does not follow from China's interpretation of Article 9 that an investigating authority would necessarily be required to impose or apply an individual antidumping duty for each company. As in the case of its Article 6.10 claim, China fails to recognize that the decision as to whether a group of companies functions as a single entity is one that an investigating authority must make *before* it can know how duties should be applied to those companies' imports. If it concludes that multiple companies are closely related and function as a single entity, an investigating authority may apply a single duty to all of those companies' imports, even under China's reading of Article 9.

II. Article 9(5) of Council Regulation No. 1225/2009 Under Article X:3(a) of the GATT 1994

8. To the extent that China is challenging Article 9(5) under Article X:3(a) of the GATT 1994, the United States submits that this measure does not fall within the scope of Article X:3(a). The Appellate Body has recognized that laws and regulations themselves may be challenged under Article X:3(a) only *where they reflect the administration* of an instrument set out in Article X:1. However, Article 9(5) appears to provide substantive rules on how antidumping duties are to be imposed rather than embody the administration of any other legal instrument. The United States therefore agrees with the EU that, under these circumstances, Article 9(5) itself cannot be found to breach GATT Article X:3(a).

III. Article 5.4 of the AD Agreement

9. While it takes no position on the merits of China's factual allegations, the United States shares China's view that, pursuant to Article 5.4, an investigating authority may not initiate an investigation unless it has conducted an examination of the evidence and determined that the requisite industry support exists. This determination and the underlying examination must take place *prior to* the authority's decision whether to initiate an investigation, and thus must be based on evidence available to the investigating authority prior to initiation. It would be neither consistent with the terms of Article 5.4 nor logical for an investigating authority to take into account facts that are revealed *subsequent to* its initiation decision in order to bolster its examination of the degree of industry support that is required *prior to* initiation.

IV. Articles 2.1 and 2.6 of the AD Agreement

10. While it takes no position on the merits of China's factual allegations, the United States disagrees with China's understanding of the definition of "like product" in antidumping proceedings. The United States notes, first, that as a purely definitional article, Article 2.6 itself imposes no obligation on WTO Members. This provision alone therefore provides no basis for a finding of inconsistency.

11. Second, Article 2.6 calls for a comparison between the "*product* under consideration" and the "like *product*." As recognized by the panels in *US – Softwood Lumber AD Final* and *EC – Salmon*, there is no requirement that each *individual* item within the "like product" be "like" each *individual* item within the imported product subject to consideration. This is confirmed by the context of Article 2.6, including Articles 2.4 and 6.10.

V. Article 3.1 of the AD Agreement

12. As the Appellate Body has recognized, "an 'objective examination' requires that the domestic industry, and the effects of dumped imports, be investigated in an unbiased manner, *without favoring the interests of any interested party, or group of interested parties, in the investigation*." In light of this understanding of Article 3.1, an investigating authority's inclusion of only supportive domestic firms, to the exclusion of other domestic firms, in its examination of the domestic industry appears to show a selection bias *ab initio*. Furthermore, where an investigating authority has failed to conduct an "objective examination" as required by Article 3.1, that error permeates the investigating authority's analyses of market share, price effects, impact, and causation under Articles 3.2, 3.4, and 3.5, respectively. Similarly, once an investigating authority defines which entities comprise the "domestic industry" that will form the basis for its injury analysis, an "objective examination" requires that the authority seek and, to the extent possible, use a consistent data set reflecting the performance of those entities.

VI. China's Claims Under Article 6 of the AD Agreement

13. China claims that the EU violated certain disclosure and procedural requirements found in Article 6 of the AD Agreement. While it takes no position on the merits of China's factual allegations, the United States respectfully requests the Panel to take into account the following general points in assessing the claims of China under Article 6 of the AD Agreement.

A. Articles 6.2 and 6.4

14. The Appellate Body has recognized that the "relevancy" of the information covered by Article 6.4 is to be determined from the perspective of the interested party, not the investigating authority. The United States therefore agrees with China that Article 6.4 generally requires that an investigating authority give interested parties access to all non-confidential information that is submitted during an investigation. Failure to provide such access would not only be inconsistent with Article 6.4, but also Article 6.2, because without access to information described in Article 6.4, an interested party is necessarily denied "a full opportunity for the defense of their interests."

15. In an antidumping investigation, the ability of an interested party to defend its interests is especially critical with respect to information related to the calculation of normal value and the price comparisons that are conducted. The United States therefore agrees with China that where such information is not disclosed, and the interested parties are therefore not able to see relevant information, those parties may be denied a full opportunity to defend their interests as required by Article 6.2 of the AD Agreement.

B. Article 6.5

16. China also raises a claim with respect to Article 6.5 of the AD Agreement, which requires that information which is by nature confidential, or which is provided on a confidential basis by parties to an investigation, shall be treated as such by the investigating authorities upon a showing of good cause. While it takes no position on the merits of China's factual allegation, the United States agrees with China that, where an investigating authority accepts information being submitted as confidential, the authority's failure to so treat that information, in particular by disclosing it to interested parties other than each of the exporting producers that furnished the information, is inconsistent with Article 6.5 of the AD Agreement.

C. Article 6.1.1

17. The United States agrees with the EU that China's claim under Article 6.1.1 of the AD Agreement is premised on a fundamental misunderstanding of the scope of that provision. China appears to assume that the term "questionnaires" in Article 6.1.1 encompasses *any* request for information made by an investigating authority, as a result of which an exporter or foreign producer should be given at least 30 days to respond to every such request made in the course of an investigation.

18. However, as the panel in *Egypt – Rebar* explained, the context of Article 6.1.1, in particular paragraphs 6 and 7 of Annex I to the AD Agreement, reveals that the term "questionnaire" for purposes of the AD Agreement refers to the original antidumping questionnaire in an investigation. Given the breadth of information requested in this initial antidumping questionnaire, it is logical that the Agreement seeks to provide a minimum time period for respondent firms to collect the information needed to be responsive to the investigating authority. The obligation in Article 6.1.1 to provide thirty days for reply therefore applies only to the original antidumping questionnaire and not to the MET and IT claim forms that are the subject of China's claim under this provision.

19. The United States notes that, notwithstanding the Article 6.1.1 claim advanced by China in this dispute, at least China's investigating authority appears to recognize that the 30-day time period for reply does not apply to every request for information made by an investigating authority. Article 12.1.1 of the SCM Agreement is worded almost identically to Article 6.1.1 of the AD Agreement, setting out the requirement for 30 days to respond to questionnaires in CVD investigations. In an ongoing CVD investigation on Grain-Oriented Electrical Steel (GOES)

from the United States, the Chinese Bureau of Fair Trade for Imports and Exports (BOFT) has issued multiple requests for information to the U.S. Government following the original questionnaire. For *none* of these requests for information, attached at Exhibit US-1, did China provide an initial period of 30 days to respond.