European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China
(DS397)

Response of the United States to the Questions from the Panel to the Third Parties

April 19, 2010

A. "AS SUCH" CLAIMS AGAINST COUNCIL REGULATION 1225/2009 ("BASIC REGULATION")

UNITED STATES:

1. The Panel understands the United States to argue that the decision of the Panel in Korea – Certain Paper allowing for the treatment of distinct legal entities relates to the interpretation of the term "exporter or producer" in the first sentence of Article 6.10. Assuming this understanding is correct, please clarify how that decision relates to the interpretation of the second sentence of Article 6.10 with respect to the question whether the exception provided for in that sentence is the only exception to the general rule set out in the first sentence.

1. Article 6.10 of the AD Agreement provides that an investigating authority "shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation." By its terms, the second sentence of this Article provides one exception to this rule when the number of exporters, producers, importers, or types of products involved is so large as to make such a determination impracticable.

2. In *Korea – Paper*, the panel found that the rule set out in the first sentence of Article 6.10 does not preclude an investigating authority from treating distinct legal entities as a single exporter or producer for purposes of dumping determinations.[1] In making this finding, the panel did not need to address the exception found in the *second* sentence of Article 6.10. Instead, the panel based its finding on its interpretation of what may constitute an "exporter"or "producer" in the *first* sentence of Article 6.10.[2] Accordingly, that panel's discussion of Article 6.10 did not relate to or otherwise elucidate whether the exception provided for in the second sentence of Article 6.10 is the only exception to the general rule set out in the first sentence.

ALL THIRD PARTIES:

2. The European Union's arguments suggest that it takes the view that, as a general rule, individual dumping margins must be calculated for foreign

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[1] *Korea – Paper (Panel)*, para. 7.161.

[2] *Korea – Paper (Panel),* paras. 7.157-7.161.

producers/exporters that are individually examined, but there is no obligation in the ADA requiring that individual duty rates be imposed for each foreign producer/exporter that is individually examined. Do you take the view that in an investigation involving a market economy exporting country, an investigating authority could calculate individual dumping margins for foreign producers/exporters, but not impose individual duty rates on those producers/exporters? If so, what is the legal basis for this view?

3. *Does the ADA generally require the imposition of an individual duty rate on foreign producers individually examined in an anti-dumping investigation? Please elaborate on the basis for your views, with specific reference to the provisions of the ADA, in particular Articles 2, 6.10, 9.2, 9.3, and 9.4.*

3. The United States will address Questions 2 and 3 together. As an initial matter, the United States notes that China's claims under Article 9 of the AD Agreement appear to conflate dumping *margins* and dumping *duties*.[3] In this respect, the United States would like to clarify that dumping duty *rates* (i.e., dumping margins) are determined for an exporter or producer, and dumping *duties* are imposed and collected on products. Dumping duty *rates* are not *imposed* on exporters or producers.[4]

4. Notwithstanding China's failure to appreciate this distinction between margins determined under Article 2 and duties imposed and collected under Article 9, the United States observes that the AD Agreement does contain certain obligations linking those duties to the individual margins generally required by the first sentence of Article 6.10, or to those individual margins determined under the second sentence of that provision. For example, Article 9.3 of the AD Agreement establishes that the amount of a dumping duty shall not exceed the margin of dumping established under Article 2.[5] Similarly, in respect of exporters or producers not individually examined in situations falling under the second sentence of Article 6.10, Article 9.4(i) limits the amount of a dumping duty to the weighted average margin established with respect to the selected exporters and producers. Thus, the dumping margin of an individual exporter or producer establishes (under Article 9.3), or is the basis for determining (under Article 9.4(i)), the maximum amount of dumping duties that may be collected on the products exported by such exporter or producer. In this regard, Article 9.3 and 9.4 establish a link between the dumping margin of the individual exporter or producer and the dumping duties collected on the products of that exporter or producer.

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[3] *See, e.g.,* China's First Written Submission, paras. 70-71, 75 and 89-90.

[4] *See, e.g.,* Articles 6.10 ("determine an individual margin of dumping *for each known exporter or producer concerned*") and 9.4 ("shall apply individual duties *to imports* from any exporter or producer not included") of the AD Agreement (emphasis added).

[5] Although Article 2 itself does not contain a provision relating the dumping margin to the amount of duties collected, the reference to Article 2 in Article 9.3 makes clear that Article 2 sets out how to calculate the margin that serves as the maximum amount of duty imposed or collected.

5. Neither provision contains an exception for products from non-market economies. Accordingly, as would be the case in investigations involving market economies, once an individual dumping margin is determined for a non-market economy exporter or producer, that dumping margin establishes the maximum amount of dumping duties that may be collected on the products of that non-market economy exporter or producer.

> *4. In the event your investigating authority were to conduct an anti-dumping investigation of imports from China, would an individual dumping margin be calculated for Chinese producers? If so, on what basis would the export price(s) for purposes of calculating margins of dumping for such producers be determined? Assuming a lesser duty were not imposed, would the level of anti-dumping duties imposed on such producers be based on such individual margins?*

6. An investigating authority, including the U.S. Department of Commerce, must first decide which firms constitute an exporter or producer for purposes of calculating an individual margin of dumping.[6] Once that decision is made, the U.S. Department of Commerce determines an individual margin of dumping for each exporter or producer. Generally, the export price of the exporter or producer is based on the price at which their goods are sold in the United States to the first unaffiliated customer. Once a margin of dumping is determined for an individual exporter or producer, that margin of dumping establishes the duties that are imposed on the products of that exporter or producer. This process applies irrespective of whether the exporter or producer is from a non-market economy.

> *5. With respect to the European Union's argument that Council Regulation 1225/2009 is not within the terms of reference of the Panel because it does not amend Council Regulation 384/96, but rather repeals and replaces it, the Panel notes that the request for establishment specifically refers to "Council Regulation 384/96, as amended". Please comment on this argument. Please comment on the proposition that a request for establishment referring to "Council Regulation 384/96 and subsequent measures" as a measure in dispute would have brought Council Regulation 1225/2009 within the Panel's terms of reference. In this regard, please address whether a reference to "subsequent measures" would be sufficient to satisfy the requirement of Article 6.2 of the DSU to "identify the specific measure[] in dispute" in all cases, or only in this case? In this regard, please address whether this reference to a "measure", is referring to the name or designation of the measure, or the content of the measure?*

7. Article 6.2 of the DSU requires that a complaining party identify in its panel request the "specific measures at issue" in the dispute. That provision, however, does not prescribe the

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[6] *See, e.g.,* U.S. Third Party Submission, para. 5.

particular *manner* in which the specific measure must be identified. As long as that measure is "identified," a complaining Member may use a particular name or number to describe the measure, a narrative description of the content of the measure, or some combination of both. In this light, it appears that China sought to do both. Specifically, China identified the specific measure that was the subject of its "as such" challenge as "Article 9(5) of Council Regulation (EC) No. 384/96 ..., as amended," which, in China's words, "provides that, in case of imports from non-market economy countries including China, the anti-dumping duty shall be specified for the supplying country concerned and not for each supplier and that an individual duty will only be specified for the exporters which can demonstrate, on the basis of properly substantiated claims, that they fulfil all the criteria listed in that provision."

8. The EU argues that this description does not encompass Article 9(5) of Regulation No. 1225/2009 because this Regulation did not "amend" Regulation No. 384/96, but instead, repealed and replaced it.[7] It may well be that the Panel is in a position to resolve the dispute between the parties without deciding this question, and that findings on Regulation No. 384/96 would be sufficient to resolve the dispute. (If so, however, the United States notes that it would not agree with the EU that no recommendation would be appropriate if the Panel found Regulation No. 384/96 inconsistent with the EU's obligations; to the contrary, the text of DSU Article 19.1. would make a recommendation mandatory in such a case, and such a recommendation would be appropriate given China's interests in compliance following the adoption of the DSB's recommendations and rulings.) The United States does not take a position on whether or not the Panel needs to examine Regulation No. 1225/2009. However, to the extent that the Panel deems it indispensable to enter into the question of whether it must examine Regulation No. 1225/2009 in order to carry out its task, the United States submits that whether Regulation No. 1225/2009 "amended" or "replaced" Regulation No. 384/96 is not dispositive of the question of whether Article 9(5) of Regulation No. 1225/2009, which was adopted subsequent to the date of panel establishment, is a measure that falls within the Panel's terms of reference.

9. Rather, the proper inquiry is whether Article 9(5) of Regulation No. 1225/2009 has modified Article 9(5) of Regulation No. 384/96 such that the essence of the measure has changed beyond the measure defined by the narrative description of the measure in China's panel request, as described above. As panels and the Appellate Body have recognized, where the subsequent measure has not so altered the challenged measure specifically identified in the panel request as to change the essence of the measure, that subsequent measure does not fall outside the panel's terms of reference.[8] In this respect, the United States notes that Article 9(5) of Regulation No. 1225/2009 is worded identically to Article 9(5) of Regulation No. 384/96. Furthermore, although the EU emphasizes that Regulation No. 1225/2009 as a whole "replaced" Regulation No. 384/96 as a whole, the EU has not suggested that Article 9(5) of Regulation No. 1225/2009 does not satisfy the narrative description of the measure in China's panel request.

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[7] EU First Written Submission, paras. 74-76.

[8] *See, e.g., EC – Chicken Cuts (AB),* paras. 157-160; *Chile – Price Band (AB),* paras. 136-139; *Brazil – Aircraft (AB)*, para. 132; *Argentina – Footwear (EC) (Panel)*, paras. 8.34, 8.37; *EC – Bananas (Panel)*, para. 7.27.

10. The Panel should not need to reach the question about the hypothetical implications of the phrase "subsequent measures," because the panel request in this dispute does not contain that phrase.

> *6. Please explain whether or not, in your view, the provision for sampling in Article 6.10 of the ADA is the sole exception to the rule in the first sentence of that provision requiring that "authorities shall, as a rule, determine an individual rate of dumping for each know exporter or producer concerned of the product under investigation." What is the basis for this view? Please give examples of other situations which, in your view, might justify departing from the rule?*

11. As discussed above in response to Question 1, the second sentence of Article 6.10 provides one explicit exception to the rule requiring the calculation of an individual margin of dumping for each known exporter or producer. This exception applies when the number of exporters, producers, importers or types of products involved is so large as to make the determination of an individual dumping margin impracticable.

12. The United States respectfully suggests that this Panel does not need to reach the question of whether there are additional exceptions to this rule to resolve this dispute. As discussed in the U.S. Written Submission, this Panel may decide the question before it with reference to the terms "exporter" and "producer" found in the general rule, contained in the first sentence of Article 6.10, to calculate individual dumping margins.[9] Specifically, this Panel need not rely on an exception to this general rule to determine whether the Basic Regulation is consistent with Article 6.10. The United States respectfully submits that, consistent with the panel's reasoning in *Korea – Paper*, this Panel should analyze Article 9(5) the Basic Regulation to determine if it allows the investigating authority to examine whether companies are in a close enough relationship to support treatment as a single exporter or producer.[10] To the extent that Article 9(5) provides for this examination, it is consistent with the first sentence of Article 6.10 of the AD Agreement.

B. DOMESTIC INDUSTRY DEFINITION

ALL THIRD PARTIES

> *9. Please comment on the view that an investigating authority may define the domestic industry in an anti-dumping investigation by focusing exclusively on known producers of the like product expressing support for the application, and once it finds a sufficient number of such producers as to account for a major proportion of total domestic production, it may define the domestic industry as*

[9] *See, e.g.,* U.S. Third Party Submission, paras. 5-6.

[10] *Korea – Paper (Panel)*, para. 7.161.

> *those producers, and need not take into consideration any other known producers, or any other producers who later become known.*

13. By requiring that the domestic industry account for at least a "major proportion" of the production of the like product, Article 4.1 of the AD Agreement does not permit an investigating authority to exclude a portion of the domestic industry that is an "important, serious, or significant" proportion of domestic production.[11] As the United States explained in its oral statement, whether the domestic industry defined by the investigating authority constitutes a "major proportion" must be evaluated not only under by reference to quantitative criteria, but also to *qualitative* criteria. This would include consideration of whether the firms excluded from the "domestic industry" themselves constitute a distinct category of producers within that industry.[12] Article 4.1 thus reflects a requirement that investigating authorities refrain from intentionally excluding pre-defined categories of producers from the domestic industry definition, other than those set out in sub-paragraphs (i) and (ii).

14. In this respect, it is inconsistent with Article 4.1 of the AD Agreement for an investigating authority to intentionally limit the domestic industry that is examined for purposes of the injury analysis to those producers that have expressed support for the petition. A domestic industry definition that is framed to exclude all or virtually all non-petitioning and non-supporting producers does not represent an "important, significant, or serious" proportion of domestic production.[13] This is especially so where the non-petitioning producers comprise a substantial portion of the industry in question. As the Appellate Body observed in *United States – Hot-Rolled Steel*, "[t]he investigation and examination must focus on the totality of the 'domestic industry' and not simply on one part, sector or segment of the domestic industry."[14]

15. Furthermore, under the example set out in the above question, an investigating authority would be using criteria for defining a domestic industry that excludes the segment of producers that have chosen not to pursue an antidumping action, resulting in a "domestic industry" that covers only the segment of producers most likely to be injured. By improperly defining the domestic industry on the basis of such inherently biased criteria, the investigating authority will have necessarily failed to meet the objectivity requirement of Article 3.1 in its examination of the effects of dumped imports on that industry.[15]

C. VOLUME OF DUMPED IMPORTS

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[11] *Argentina – Poultry (Panel)*, para.7.341.

[12] *See* U.S. Oral Statement, paras. 25-26.

[13] *Argentina – Poultry (Panel)*, para. 7.341

[14] *US – Hot-Rolled Steel (AB)*, para. 190.

[15] *See US – Hot-Rolled Steel (AB)*, para. 193 ("[A]n 'objective examination' requires that the domestic industry, and the effects of dumped imports, be investigated in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation.").

ALL THIRD PARTIES

10. Please comment on the proposition that in any anti-dumping investigation where non-dumped imports are included in the volume of dumped imports by an investigating authority, a panel reviewing the final determination in such investigation must determine whether the particular volume of non-dumped imports in question will be able to affect the outcome of the examination. In your comments, please take into consideration the views of the Appellate Body in Japan - DRAMs (Korea) at paragraphs 131-139. If your view is that a panel is not required to make such a determination, please comment on the proposition that a panel may or may not determine whether the particular volume of non-dumped imports in question will be able to affect the outcome of the examination, and on what basis it might make a decision in this respect.

16. Article 3.1 of the AD Agreement requires that "a determination of injury . . . be based on positive evidence and involve an objective determination" of the volume, price effects and impact of "dumped imports." Articles 3.2, 3.4, and 3.5 set out in further detail how the investigating authority conducts its examination, respectively, of the volume, price effects, and impact of the "dumped imports." Therefore, when setting out the injury conclusions in its published final determination, the investigating authority should explain how its examination of "dumped" imports led to those conclusions.[16] This means that the investigating authority should not include in its volume analysis any imports from producers that were found not to be dumping, as the EU appears to have done in this investigation according to China.[17] The EU argues that its inclusion of non-dumped imports in this case does not constitute a violation of the AD Agreement because the non-dumped imports in question were from "two very small exporters representing only a marginal amount of People's Republic of China imports."[18]

17. As the Appellate Body has confirmed, a panel reviewing the determination of an investigating authority should base its findings on the authority's reasoning and conclusions set out in that published determination rather than substitute the panel's own views of how the investigating authority's conclusions should have been substantiated.[19] Accordingly, if an investigating authority includes *non*-dumped imports in its injury analysis, it is the role of that *investigating authority* in its published determination, not a *panel* reviewing the determination, to explain whether the particular volume of non-dumped imports in question might affect the

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[16] *See, e.g., Japan – DRAMS (AB)*, para. 159 ("[I]t follows from the requirement that the investigating authority provide a reasoned and adequate explanation for its conclusions, that the underlying rationale behind those conclusions be set out in the investigating authority's determination.").

[17] *See* China's First Written Submission, para. 408. The United States agrees with the EC, however, that an investigating authority may include in its analysis all imports from producers found to be dumping. *See* EU's First Written Submission, para. 537.

[18] EU's First Written Submission, para. 516.

[19] *See, e.g., Japan – DRAMS (AB)*, para. 159; *US – DRAMS*, paras. 186-188.

outcome of the injury examination and to explain its conclusions in this respect. In the absence of such an explanation, the investigating authority will have failed to explain how its examination of "dumped" imports supported its injury determination, as required by the above Article 3 provisions.

18. Where an investigating authority knowingly includes non-dumped imports in its injury analysis, it may make findings in its published final determination as to the materiality and significance of the volumes of non-dumped imports. For example, the investigating authority could explain in its published determination if the nature of the data made it impossible to separate some of the non-dumped imports from dumped imports. Or, in some cases, an investigating authority might address in its published determination the significance of the volume of non-dumped imports and whether the inclusion of those non-dumped imports affected its injury determination. In those circumstances, a panel could review the investigating authority's own contemporaneous findings and explanation and reach a conclusion under Article 3 on that basis.

19. Paragraphs 131-139 of the Appellate Body Report in *Japan – DRAMS* do not support a different conclusion. Indeed, at the outset of that discussion, the Appellate Body recalled its statement in *US – DRAMS*, that "'a panel's analysis should usually seek to review the agency's decision on its own terms, in particular, by identifying the inferences drawn by the *agency* from the evidence, and then by considering whether the evidence could sustain that inference.'"[20] The United States believes it is similarly appropriate here to focus on the agency's own terms describing its decision, particularly given that the question is whether an investigating authority has properly performed an analysis specifically required by the Agreement in question, such as the requirement in Article 3 of the AD Agreement that the investigating authority examine the volume of *dumped* imports.

20. In *Japan – DRAMS*, the panel had found that the evidence did not support one of the investigating authority's intermediate conclusions made in support of the authority's ultimate determination of entrustment and direction under Article 1.1(a)(iv) of the SCM Agreement. Following this finding, the panel had concluded that it could not determine whether the investigating authority's ultimate entrustment and direction determination was consistent with the SCM Agreement on the basis of the remaining evidence because that was not itself the basis for the investigating authority's determination. The Appellate Body disagreed with the panel's approach, noting that the investigating authority had based its determination on the totality of the evidence before it, and that the panel should have evaluated the entrustment and direction determination on the basis of that remaining evidence.[21] In reaching this conclusion, the Appellate Body noted that the investigating authority could not have been expected to engage in that same inquiry – that is, whether its determination could be supported on the basis of the remaining evidence – because the authority "[could not] be expected to proceed on the basis that

[20] *Japan – DRAMS* (AB), para. 131, quoting *US – DRAMS* (AB), para. 154.

[21] *See Japan – DRAMS (AB)*, paras. 132-134.

certain aspects of its reasoning would later be found to be faulty."[22]

21. The issue presented in the Panel's question in this dispute is not one of adequate evidentiary support, such that the discarding of certain evidence would nevertheless leave additional evidence that could substantiate the investigating authority's determination. Rather, this issue relates directly to the legal question whether the investigating authority based its injury determination on an examination of "dumped imports," as required by Article 3. The EU claims that its investigating authority "considered" this question.[23] The United States does not take a view on whether the determination adequately demonstrates that the authority considered or explained how it considered the significance of the non-dumped imports. The Panel can evaluate whether the published determination evinces such an appropriate consideration and explanation, but should not take it upon itself to examine, in the first instance, whether the volume of non-dumped imports had an effect on the injury determination.

D. PROCEDURAL CLAIMS

ALL THIRD PARTIES

11. The Panel notes that in connection with some of its procedural claims, China cites, in addition to others, Articles 6.2 and 6.4 of the ADA. What is the nature of the obligations set out in these two provisions? Please explain in connection with the obligations set forth in other paragraphs of Article 6, such as paragraphs 5 and 9. Do the different paragraphs of Article 6 set forth distinct obligations? Please elaborate.

22. Articles 6.2 and 6.4 of the AD Agreement each impose obligations on an investigating authority to provide particular opportunities to interested parties that facilitate their presentation of information in the course of an anti-dumping investigation. In particular, Article 6.2 requires an investigating authority to provide interested parties "full opportunity" to defend their respective interests, including opportunities to meet parties with interests adverse to theirs. Article 6.4 generally requires an investigating authority to provide interested parties opportunities to see specific information and to prepare presentations on the basis of that information.

23. Articles 6.1, 6.5, and 6.9 similarly require an investigating authority to provide particular opportunities for interested parties. Pursuant to Articles 6.1 and 6.5, an investigating authority must afford interested parties, respectively, the opportunity to provide written submissions of relevant evidence, and the opportunity to provide certain information to the investigating authority on a confidential basis and with concomitant protections. Under Article 6.9, an investigating authority must give interested parties the opportunity to be informed of certain "essential facts" in sufficient time for those parties to be able to defend their respective interests.

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[22] *Japan – DRAMS (AB)*, para. 133.

[23] *See* EU's First Written Submission, para. 522.

24. Notwithstanding the obligations separately set out in the above provisions, the United States recognizes that, under certain circumstances, particular obligations may overlap with each other. For example, there may be situations where the actions of an investigating authority inconsistent with Article 6.4,[24] 6.1, or 6.9 are also inconsistent with the obligation in the first sentence of Article 6.2.

12. Please comment on the proposition that the names of complainants and supporters of the complaint are "by nature confidential" within the meaning of Article 6.5. May the names of complainants be treated as confidential in any case where the complainants state that they are not willing to have their names disclosed, to avoid potential retaliation which could be carried out by some of their customers who also buy products directly from [the country subject to the investigation]. Would such a statement suffice to establish good cause to treat the names of complainants and supporters of the complaint as confidential under Article 6.5?

25. As discussed in the above response to question 11, Article 6.2 of the AD Agreement requires that all interested parties, including importers, foreign producers and exporters, be afforded opportunities, upon request, to meet with, and respond to points made by, parties with adverse interests. These opportunities could not be provided to those respondents without their knowing the identity of those interested parties with adverse interests, including complainants. Because Article 6.2 thus contemplates the disclosure of the identity of complainants to respondents in an investigation, the names of complainants are not "by nature confidential" within the meaning of Article 6.5, nor should investigating authorities otherwise allow complainants to withhold this information from other interested parties.

26. Questions concerning the identity of non-parties that may have indicated support for (or opposition to) a complaint entail different considerations. The United States believes that an investigating authority may treat the identities of such non-parties as "by nature confidential" in the light of business concerns that may inhere in the disclosure of those views, including the concerns regarding customers as described in the above question. As distinguished from the complainants themselves, non-party firms have not chosen to seek initiation of an investigation and make allegations about respondents' pricing behavior and injury to the domestic industry. Indeed, in many cases, non-parties are providing information either voluntarily or because they are required to do so under the law of the importing Member, and are not seeking the imposition of duties that they believe will benefit them. Consequently, the Article 6.2 concerns noted above, in particular ensuring the right to confront interested parties with adverse interests in the proceeding, do not apply.

[24] *See, e.g., EC – Tube & Pipe Fittings (AB)*, para. 149.