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

(AB-2011-2)

THIRD PARTICIPANT ORAL STATEMENT OF THE UNITED STATES OF AMERICA

***** Check Against Delivery*****

May 4, 2011

I. Introduction

1. Good afternoon, Mr. Chairperson and members of the Division. The United States appreciates the opportunity to appear before you today. This afternoon, we focus on two issues: first, the Panel Report's interpretation of Article 6.10 of the *Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (AD Agreement); and second, the Panel Report's interpretation of Articles 3.1 and 4.1 of the AD Agreement.

II. The Panel's Interpretation of Article 6.10 of the AD Agreement Is Incorrect

2. Article 6.10 states: "The authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation". One of the key questions is what constitutes an "exporter" or "producer".

3. The Panel Report correctly finds that the facts of a particular investigation may support a finding that two or more legally distinct companies are sufficiently related to be considered a single exporter or producer;[1] as well as that the facts of a particular case may support a finding that one or more nominally distinct producers or exporters is sufficiently related to the State to justify treating them as a single exporter or producer.[2]

4. These understandings are based on the fact that an investigating authority must determine which firms constitute an individual "exporter" or "producer" before it can calculate an individual margin of dumping for that exporter or producer. If two or more firms are sufficiently related – for example, a parent company and its subsidiaries where the parent company coordinates the production or pricing activities of the subsidiaries – then it may be appropriate to

[1] Panel Report, para. 7.92.
[2] Panel Report, para. 7.94.

consider those firms as a single exporter or producer subject to a single margin of dumping. This is also the understanding of Article 6.10 which the panel in *Korea – Paper* employed.

5. The Panel Report errs, however, in finding that Article 6.10 precludes the investigating authority from requiring that an exporter or producer in a non-market economy (NME) demonstrate that it is sufficiently independent from the State to warrant individual treatment.[3] The Panel Report's conclusion in this regard finds no support in the text of Article 6.10. Article 6.10 does not address, in any manner, the burden of proof in determining which firms constitute an individual exporter or producer.

6. As an initial matter, we note that the Panel Report does not appear to dispute that an investigating authority may *request* information from an exporter or producer in order to evaluate an issue that is relevant to the authority's investigation. Rather, the Panel Report found that by requiring non-market economy firms to demonstrate independence from the State before providing them with an individual margin of dumping, the EU impermissibly shifted the evidentiary burden to those NME firms.[4] As the United States and the EU have noted in their written submissions, this finding does not appear to have a basis in Article 6.10. Further, the Panel Report incorrectly states that the starting point for such a test is the presumption that NME producers are related to the State.[5] The actual starting point is the recognition that these firms operate within a non-market economy.

---

[3] Panel Report, para. 7.96.
[4] Panel Report, para. 7.95.
[5] Panel Report, para. 7.95.

7. Where the investigation concerns firms in a non-market economy – such as China – it is quite reasonable to request those firms to provide evidence to demonstrate independence from the State before assigning individual margins of dumping. Indeed, in other contexts, the covered agreements recognize that an investigating authority may require different types of evidence to evaluate a claim of dumping with respect to firms located in a non-market economy as compared to a market economy.[6] For example, Members have routinely applied an alternative antidumping methodology for imports from non-market economies which bases normal value on data from an analogue country.[7] This methodology, which may involve considerations beyond a strict comparison with domestic prices, necessarily requires an investigating authority to request a range of information from NME firms, such as production data, that it would not need to request in an investigation involving a market economy.

8. The Panel Report also errs by interpreting Article 6.10 of the AD Agreement as precluding an investigating authority, in assessing whether an NME exporter or producer is sufficiently independent from the State, from considering factors relating to the role of the State in the way business is conducted.[8] Such a restriction is not based in the text of Article 6.10, which does not establish criteria for an investigating authority to evaluate in determining which firms constitute an individual exporter or producer. Rather, the Panel Report states that such criteria are impermissible because they are not the same as the criteria affirmed in *Korea – Paper*, which the Report characterizes as "relat[ing] to the commercial relationship between

---

[6] Article VI:1, Ad Note 2.
[7] *See generally*, EU Appellant Submission, paras. 24-28.
[8] Panel Report, para. 7.93.

nominally distinct companies."[9] This conclusion misapplies the reasoning of *Korea – Paper*. The *Korea – Paper* panel did not purport to identify the *sole* criteria through which an investigating authority can determine which firms constitute individual exporters or producers. Instead, the panel analyzed the criteria employed to determine if they were reasonable in light of the facts of that particular case and the purpose for which they were being used. Here, where the antidumping investigation involved firms in a non-market economy – economies in which the State may control the production or pricing decisions of firms – it is entirely reasonable to inquire into the relationship between the firms and the State to determine which firms constitute individual exporters or producers.

9. By definition, a non-market economy is one in which there is pervasive government interference in the economy. Such interference can result in the State exerting influence over firms, including by directing the production and pricing behavior of firms. In these circumstances, the State is analogous to a parent company that makes decisions for subsidiary companies and an investigating authority could find that these firms and the State should be treated as a single exporter or producer and subject to a single dumping margin. Nothing in Article 6.10 prohibits an investigating authority from engaging in such a reasonable inquiry into independence from the State before assigning individual margins of dumping to firms located in a non-market economy.

III. Panel's Interpretation of Articles 3.1 and 4.1 of the AD Agreement is Incorrect

10. Turning to Articles 3.1 and 4.1 of the AD Agreement, the United States wishes to stress

[9] Panel Report, para. 7.93.

the importance of properly defining the domestic industry. An investigating authority's definition of the domestic industry is one of the most consequential decisions made during an injury investigation. Absent a proper definition, the investigating authority may be precluded from conducting an objective examination based on positive evidence, as required by Article 3.1. Further, a proper definition of the domestic industry is essential to ensure that the investigating authority's examination under Articles 3.2, 3.4, and 3.5 addresses the impact of dumped imports on the appropriate set of domestic producers. If the investigating authority fails to properly define the domestic industry, its consideration under Article 3.4 of the relevant economic factors having a bearing on the domestic industry, and its examination under Article 3.5 of whether there is a causal link between dumped imports and injury to the domestic industry, will be flawed from the outset.

11. As the Appellate Body recognized in *U.S. – Hot-Rolled Steel*, "[i]nvestigating authorities are directed to investigate and examine imports in relation to the 'domestic industry,' 'the domestic market for the like product,' and 'domestic producers of like products.'"[10] Similarly, in *Mexico – Steel Pipes and Tubes*, the panel observed that "[t]he focus of an injury determination is the state of the 'domestic industry'; the causation analysis focuses on the causal link between dumping and any injury to the domestic industry."[11] Given that injury investigations focus on the state of a domestic industry, an investigating authority's approach to defining the domestic industry is a critical and potentially outcome determinative component of its injury analysis.

---

[10] Appellate Body Report, *United States – Antidumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001, para. 190.

[11] Panel Report, *Mexico – Anti-Dumping Duties on Steel Pipes and Tubes from Guatemala*, WT/DS331/R, adopted 24 July 2007, para. 7.207.

12. As discussed in our written submission, the United States is concerned that the Panel Report appears to sanction an approach to defining the domestic industry that likely results in a biased definition. We are troubled by a practice whereby the inclusion of producers within the definition of the domestic industry is completely voluntary. This approach may allow petitioners to define the domestic industry in a self-interested manner, to the detriment of the importers and foreign producers and exporters. In particular, producers with lagging performance, including the petitioners, would have the greatest incentive to respond to a notice of investigation and volunteer for inclusion in the domestic industry.

13. The United States is also of the view that Article 4.1 does not envision exclusion of most known producers from a domestic industry definition, for reasons other than those provided under subparagraphs (i) and (ii) of that Article. Certainly, Article 4.1 is written so as to recognize the balance between the broad coverage of domestic producers and the realities that collection of data from all producers is often not feasible. But we disagree with the view that investigating authorities may exclude whomever they like from a domestic industry definition as long as the producers they include arguably account for a self-described "major proportion" of total domestic industry production. The Panel's interpretation would render meaningless the specific exceptions to the inclusive standard for defining the domestic industry under Article 4.1, and would lead to an improper basis for conducting an objective examination under Article 3.1.

IV. CONCLUSION

14. This concludes our statement. Thank you for your attention, and we look forward to any questions the Division may have.