RUSSIA – ANTI-DUMPING DUTIES ON LIGHT COMMERCIAL VEHICLES FROM GERMANY AND ITALY

(AB-2017-3 / DS479)

THIRD PARTICIPANT ORAL STATEMENT OF THE UNITED STATES OF AMERICA

November 13, 2017

I. INTRODUCTION

Presiding Member, Members of the Division:

1. Thank you for the opportunity to appear today and present the U.S. views as a third participant in this dispute. The U.S. written submission addresses certain issues of systemic concern regarding the interpretation and application of the Antidumping Agreement.[1]

2. Our comments today focus on a subset of the issues addressed in our written submission. Specifically, we address the proper interpretation of Article 4.1 of the Antidumping Agreement, read in context with Article 3.1 of the Antidumping Agreement.

II. EXCLUDING PRODUCERS FROM THE DEFINITION OF THE DOMESTIC INDUSTRY BASED ON DEFICIENCIES IN DATA SUBMITTED

3. First, we discuss Russia's arguments regarding deficiencies in the data submitted by a producer. These arguments suggest that an investigating authority has only two choices: either include the producer in the domestic industry and breach the "positive evidence" requirement of Article 3.1, or exclude the producer from the domestic industry entirely.[2] This is a false dichotomy that is not supported by the text of the Antidumping Agreement.

4. Article 4.1 is definitional. It specifies which producers are to be included in the domestic industry. Nothing in Article 4.1 refers to the quality of data collected from those producers, nor is there any suggestion that deficiencies in questionnaire responses require the exclusion of a producer from the domestic industry.

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[1] *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*.
[2] Russia Appellant Submission, paras. 39-46; *see also* Brazil Third Participant Submission, pp. 6-8.

5. The participants and third participants all appear to agree that Article 4.1 should be read in context with Article 3.1,[3] and the overarching obligations set out in Article 3.1 – to carry out an objective examination based on positive evidence – plainly extend to an authority's definition of the domestic industry.

6. However, while an authority's definition of the domestic industry must be supported by positive evidence, Article 3.1 does not operate as an exception to Article 4.1. Indeed, Article 4.1 admits of only two exceptions,[4] neither of which is relevant here. Moreover, to exclude a producer in this situation could introduce a material risk of bias or distortion in the injury analysis.

7. Instead, an authority that doubts the quality of data submitted must fulfil its obligation to undertake a "systematic inquiry" or "careful study" of the matter before it.[5] As evident in provisions such as Articles 6.6 and 6.7 of the Antidumping Agreement, the authority must seek out and attempt to obtain the necessary information in the course of its injury analysis.

III. ORDER OF ANALYSIS UNDER ARTICLES 4.1 AND 3.1 OF THE ANTIDUMPING AGREEMENT

8. We now turn to the sequencing issue raised in the Panel's findings under Articles 4.1 and 3.1 – *i.e.*, whether an investigating authority may only evaluate data submitted by domestic producers after it has defined the domestic industry.

[3] Russia Appellant Submission, para. 32; EU Appellee Submission, paras. 38, 63; U.S. Third Participant Submission, para. 11; Brazil Third Participant Submission, pp. 6-7; Japan Third Participant Submission, para. 10; Ukraine Third Participant Submission, para. 7.
[4] AD Agreement, Art. 4.1(i), (ii).
[5] *US – Wheat Gluten (AB)*, para. 53.

9. Nothing in Articles 4.1 or 3.1 requires this particular order of analysis. Nor is the sequence suggested by the Panel the only way to ensure consistency with Article 3.1. It is not difficult to imagine circumstances in which an investigating authority would need to collect and review evidence before defining the domestic industry. For instance, an authority may need to collect and review evidence regarding the domestic like product, or to ascertain whether there are related parties, prior to defining the domestic industry. An authority may also need to "redefine" the domestic industry after collecting and reviewing evidence – for instance, to broaden or narrow the definition following a modification of the scope of the investigated product.

10. Of course, an authority's flexibility in structuring its investigation is not unbounded, and, consistent with Article 3.1, the timing and sequencing of the investigation must not give rise to a material risk of distorting the injury determination. In some cases, the sequence of an investigating authority's analysis – when taken with other facts – could establish that an injury determination is not supported by an objective assessment or based on positive evidence.

11. In other words, collecting and reviewing data before defining the domestic industry is not *per se* contrary to Article 3.1. But this sequence may be a relevant fact when determining whether an authority has conducted an injury determination consistent with Article 3.1.

IV. CONCLUSION

12. This concludes the U.S. oral statement. The United States would like to thank the Division for its consideration of the U.S. views.