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

**(AB-2017-3 / DS479)**

**THIRD PARTICIPANT SUBMISSION OF THE UNITED STATES OF AMERICA**

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## SERVICE LIST

Participants

H.E. Mr. Marc Vanheukelen, Permanent Mission of the European Union
H.E. Mr. Gennady Ovechko, Permanent Mission of the Russian Federation

Third participants

H.E. Mr. Evandro Didonet, Permanent Mission of Brazil
H.E. Mr. Yu Jianhua, Permanent Mission of the People's Republic of China
H.E. Ms. Anjali Prasad, Permanent Mission of India
H.E. Mr. Junichi Ihara, Permanent Mission of Japan
H.E. Mr. Kyong-lim Choi, Permanent Mission of Korea
H.E. Mr. Kemal Madenoğlu, Permanent Mission of Turkey
H.E. Mr. Yurii Klymenko, Permanent Mission of Ukraine

## TABLE OF CONTENTS

**I. INTRODUCTION ..... 1**

**II. THE PANEL'S ANALYSIS UNDER ARTICLE 4.1 OF THE AD AGREEMENT ..... 1**

A. THE PANEL DID NOT ERR IN FINDING THAT DEFICIENCIES IN THE DATA SUBMITTED DO NOT PERMIT EXCLUSION OF PRODUCERS FROM THE DOMESTIC INDUSTRY ..... 1

B. THE PANEL ERRED IN FINDING THAT ARTICLES 4.1 AND 3.1 PROHIBIT THE "SEQUENCE OF EVENTS" IN THE AUTHORITY'S ANALYSIS ..... 4

**III. THE PANEL'S ANALYSIS UNDER ARTICLE 3.2 OF THE AD AGREEMENT ..... 6**

**IV. THE PANEL'S ANALYSIS UNDER ARTICLE 3.4 OF THE AD AGREEMENT ..... 10**

**V. THE PANEL'S ANALYSIS UNDER ARTICLE 6.9 OF THE AD AGREEMENT ..... 12**

A. THE PANEL ERRED IN ITS ANALYSIS OF WHETHER A SOURCE OF DATA CONSTITUTES AN "ESSENTIAL FACT UNDER CONSIDERATION" ..... 12

B. INCONSISTENCY WITH ARTICLE 6.5 OF THE AD AGREEMENT DOES NOT NECESSARILY RESULT IN INCONSISTENCY WITH ARTICLE 6.9 ..... 14

**VI. CONCLUSION ..... 16**

## TABLE OF REPORTS

| SHORT TITLE | FULL CASE TITLE AND CITATION |
|---|---|
| *China – Broiler Products* | Panel Report, *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*, WT/DS427/R and Add.1, adopted 25 September 2013 |
| *China – GOES (AB)* | Appellate Body Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/AB/R, adopted 16 November 2012 |
| *China – GOES (Panel)* | Panel Report, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States*, WT/DS414/R and Add.1, adopted 16 November 2012, upheld by Appellate Body Report WT/DS414/AB/R |
| *China – HP-SSST (Japan) / China – HP-SSST (EU) (AB)* | Appellate Body Reports, *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan / China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union*, WT/DS454/AB/R and Add.1 / WT/DS460/AB/R and Add.1, adopted 28 October 2015 |
| *EC – Fasteners (China) (AB)* | Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R, adopted 28 July 2011 |
| *EC – Tube or Pipe Fittings (AB)* | Appellate Body Report, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, WT/DS219/AB/R, adopted 18 August 2003 |
| *Mexico – Anti-Dumping Measures on Rice (AB)* | Appellate Body Report, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice*, WT/DS295/AB/R, adopted 20 December 2005 |
| *Thailand – H-Beams (AB)* | Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/AB/R, adopted 5 April 2001 |
| *Thailand – H-Beams (Panel)* | Panel Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, WT/DS122/R, adopted 5 April 2001, as modified by Appellate Body Report WT/DS122/AB/R |
| *US – Hot-Rolled Steel (AB)* | Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, adopted 23 August 2001 |

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|---|---|
| *US – Tyres (China) (AB)* | Appellate Body Report, *United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*, WT/DS399/AB/R, adopted 5 October 2011 |
| *US – Wheat Gluten (AB)* | Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/AB/R, adopted 22 December 2000 |

## I. INTRODUCTION

1. The United States welcomes the opportunity to present its views on certain findings raised on appeal by the Russian Federation ("Russia") and the European Union "(EU") in *Russia – Anti-Dumping Duties on Light Commercial Vehicles from Germany and Italy* (DS479). In this submission, the United States will address certain issues of legal interpretation concerning Articles 3, 4, and 6 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "AD Agreement") that are implicated in this dispute.

## II. THE PANEL'S ANALYSIS UNDER ARTICLE 4.1 OF THE AD AGREEMENT

2. The United States comments on two aspects of the Panel Report challenged by the parties on appeal regarding Article 4.1 of the AD Agreement: (a) the Panel's finding that Article 4.1 of the AD Agreement does not permit an investigating authority to define the domestic industry based on alleged deficiencies in the data submitted by producers; and (b) the Panel's finding that Article 4.1 of the AD Agreement prohibits a "sequence of events" in which an investigating authority excludes a producer from the definition of the domestic industry after having reviewed data submitted by that producer.

### A. The Panel Did Not Err In Finding That Deficiencies In The Data Submitted Do Not Permit Exclusion Of Producers From The Domestic Industry

3. In its report, the Panel found that the investigating authority, the Department for Internal Market Defence of the Eurasian Economic Community ("DIMD"), acted inconsistently with Articles 4.1 and 3.1 by excluding a producer from the definition of the domestic industry on the basis of alleged deficiencies in data submitted by that producer.[1] For the Panel, "the quality of the data" submitted by a producer has no bearing on the definition of the domestic industry under Article 4.1 of the AD Agreement.[2] The Panel found that the definition of the domestic industry and the collection and use of the data submitted are "separate issues."[3] As the Panel observed, "the only required quality for domestic industry is to be a producer of the like product."[4] The Panel found that the alleged deficiencies in data highlighted by the DIMD – such as a failure to distinguish between confidential and non-confidential data, and alleged "gaps and inaccuracies" – were irrelevant to the inquiry under Article 4.1.[5]

4. On appeal, Russia argues that the definition of the domestic industry must be grounded in "credible and reliable data from the domestic producers."[6] Absent such information, the resulting definition would be inconsistent with the "positive evidence" requirement set out in Article 3.1.[7] According to Russia, Article 4.1 should be "read together with" Article 3.1, and

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[1] Panel Report, paras. 7.12-7.27.
[2] Panel Report, para. 7.15(c).
[3] Panel Report, para. 7.15(c) n.85.
[4] Panel Report, para. 7.15(c).
[5] Panel Report, para. 7.15(c).
[6] Russia Appellant Submission, para. 40.
[7] Russia Appellant Submission, para. 40.

Russia asserts that the Panel's findings disregard the principles of harmonious and effective interpretation.[8]

5. The United States takes no position on the factual merits of the Panel's findings. The United States provides the following comments on the applicable legal obligations.

6. Article 4.1 of the AD Agreement provides that "the term 'domestic industry' shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products."

7. Article 4.1 is subject to only two exceptions: (1) if producers are related to exporters or importers or are themselves importers, they may be excluded from the domestic industry; and (2) if the territory of a Member may be subdivided into two or more competitive markets, the producers within each market may be regarded as a separate industry.[9]

8. As the Panel found, there is no basis for inferring an additional exception to Article 4.1, based on the quality of the data submitted by certain producers over the course of the investigation.[10] Article 4.1 is definitional, and frames the inquiry in terms of the "domestic producers," as well as their "output," "products," and "production." The text of Article 4.1 does not refer to the quality of data collected from particular producers, or contemplate that a producer may be excluded from the definition of the domestic industry based on alleged data deficiencies.

9. Contrary to Russia's assertion,[11] Article 3.1 of the AD Agreement does not support the exclusion of producers from the domestic industry based on such deficiencies. Article 3.1 provides the following:

> 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.

10. Article 3.1 of the AD Agreement thus 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

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[8] Russia Appellant Submission, paras. 42-55.
[9] AD Agreement, Art. 4.1(i), (ii); *see also id.*, Art. 4.2 (elaborating on exception articulated in Art. 4.1(ii)). Article 4.3 does not articulate an exception to Article 4.1. Instead, Article 4.3 clarifies that, where parties to an agreement reached under Article XXIV(8)(a) have created a single unified market, the domestic industry shall be defined as the industry in "the entire area of integration."
[10] *See* Panel Report, paras. 7.20-7.21.
[11] Russia Appellant Submission, paras. 32-41.

and trustworthy."[12] 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. Under this obligation, the domestic industry is to be investigated in an unbiased manner that does not favor the interests of any interested party in the investigation.[13] How an authority chooses to define the domestic industry has repercussions throughout the course of the injury analysis and determination; thus, the overarching obligations of Article 3.1 necessarily extend to an authority's definition of the domestic industry.

11. The United States therefore agrees with Russia and the EU that Article 4.1 should be read in context with Article 3.1.[14] But Article 3.1 does not set out an exception to Article 4.1.[15]

12. Nor does Article 3.1 suggest that the definition of the domestic industry hinges on the quality of the evidence submitted by domestic producers, as Russia argues.[16] Rather, Article 3.1 requires an investigating authority to define the domestic industry in a fair and unbiased manner "to ensure the accuracy of an injury determination."[17] An investigating authority "must not act so as to give rise to a material risk of distortion in defining the domestic industry, for example, by excluding a whole category of producers of the like product."[18] A panel therefore should assess whether the exclusion of one or more producers from the injury analysis was biased or designed to favor the interest of any group of interested parties in the investigation, including the producer who filed the petition.[19]

13. If a producer submits deficient data in response to any particular inquiry in a questionnaire, and an authority is unable to obtain reliable data concerning the particular inquiry, the authority could disregard the deficient data in its injury analysis, on the basis that the data does not constitute positive evidence under Article 3.1. To the extent the data relates to the investigating authorities' examination of the effects of the subject imports on the domestic industry under Article 3, the deficiency in data submitted would not have a bearing on whether that producer was appropriately included in the definition of the domestic industry in accordance with Article 4.1 and the objectivity requirement of Article 3.1.

14. Articles 5 and 6 of the AD Agreement confirm that investigating authorities are reasonably expected to examine the accuracy of, and seek sufficient evidence. The Appellate Body noted in *US – Wheat Gluten* that the ordinary meaning of the term "investigation" "suggests that the competent authorities should carry out a 'systematic inquiry' or a 'careful study' into the matter before them."[20] Thus, the term "investigation" in Article 5.1 of the AD Agreement indicates that investigating authorities must conduct an examination of the relevant issues that is active, systematic, and careful. Likewise, Article 6.6 provides that authorities

[12] *Mexico – Anti-Dumping Measures on Rice (AB)*, paras. 164-165.
[13] *US – Hot-Rolled Steel (AB)*, para. 193.
[14] Russia Appellant Submission, para. 32; EU Appellee Submission, paras. 38, 63.
[15] *See* Panel Report, paras. 7.20-7.21.
[16] Russia Appellant Submission, paras. 32-41.
[17] *EC – Fasteners (China) (AB)*, para. 414.
[18] *EC – Fasteners (China) (AB)*, para. 414.
[19] *US – Hot-Rolled Steel (AB)*, para. 193.
[20] *US – Wheat Gluten (AB)*, para. 53 (citations omitted).

"shall during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested parties upon which their findings are based."

15. The Appellate Body has recognized that a proper definition of the domestic industry is critical to ensuring an accurate and unbiased injury analysis.[21] Once an authority has defined the domestic industry, it cannot discount without objective reasons the data provided by certain members of the domestic industry. If an investigating authority were to exclude producers from the definition of the domestic industry based on alleged deficiencies in questionnaire responses, this could narrow the data set and risk introducing bias or distortion into the authority's injury analysis.[22] Contrary to Russia's suggestion,[23] a proper interpretation of Articles 4.1 and 3.1 of the AD Agreement should prevent, rather than encourage such a result.

### B. The Panel Erred In Finding That Articles 4.1 And 3.1 Prohibit The "Sequence Of Events" In The Authority's Analysis

16. In its report, the Panel suggested that Articles 4.1 and 3.1 of the AD Agreement require investigating authorities to define the domestic industry before collecting and reviewing data from producers. The Panel observed that the DIMD decided not to include a producer in the domestic industry "after having reviewed that producer's data."[24] The Panel found that "[t]his sequence of events gives rise to an appearance of selecting among domestic producers based on their data to ensure a particular outcome."[25] For the Panel, "assessing the data collected from domestic producers before defining the domestic industry in itself gives rise to a risk of material distortion in the ensuing injury analysis."[26]

17. Russia appeals these findings, arguing that "the Anti-Dumping Agreement does not prescribe the exact sequence of procedural steps to define the domestic industry."[27] According to Russia, the Panel "read[ ] into Article 4.1 . . . obligations that are not there."[28]

18. The United States does not comment on factual aspects of the Panel's findings. But the United States agrees with Russia that, in addressing the sequencing of an investigation, the Panel appears to have misinterpreted Articles 4.1 and 3.1.

19. Neither Article 4.1 nor Article 3.1 of the AD Agreement mandates the precise order of analysis suggested by the Panel. Article 4.1 provides that "the term 'domestic industry' shall be interpreted as referring to" producers as a whole of the like product or producers that account for a major proportion of total output. This provision does not address when an authority must define the domestic industry relative to the gathering and review of evidence. This contrasts

[21] *EC – Fasteners* (China) (AB), para. 414.
[22] *US – Hot-Rolled Steel (AB)*, para. 193.
[23] Russia Appellant Submission, paras. 38-55.
[24] Panel Report, para. 7.15(a).
[25] Panel Report, para. 7.15(a); *see also id.*, para. 7.15(c) n.85 (finding that where the investigating authority has already reviewed producer data, "the risk of result-driven choices and a distorted determination is simply too great for such a procedure to be acceptable").
[26] Panel Report, para. 7.21(d).
[27] Russia Appellant Submission, para. 59.
[28] Russia Appellant Submission, para. 60.

with several other provisions in the AD Agreement, which clearly address issues of timing and sequencing.[29]

20. Equally, Article 3.1 does not address timing and sequencing with respect to the definition of the domestic industry. Article 3.1 sets out the overarching requirements applicable at all stages of an injury determination – i.e., that the determination must be based on positive evidence and involve an objective examination. The Appellate Body has found that this "general obligation 'informs the more detailed obligations' in the remainder of Article 3."[30]

21. The United States emphasizes that, in establishing the timing and sequencing of the investigation, an authority must not compromise the objectivity of the injury determination. An authority must adhere to the overarching requirements of Article 3.1, and structure its investigation so as to ensure that the resulting injury determination is supported by positive evidence and reflects an objective examination. In particular, an investigating authority must ensure that its approach does not yield a definition of the domestic industry that would give rise to a material risk of distorting the injury determination.[31]

22. The United States observes that, in its final determination, the investigating authority cannot analyze the effects of imports on the domestic industry without having defined the like product and the domestic industry that produces that product. The definition of the domestic industry affects several evaluations that flow into the final determination. For instance, an authority is to analyze the impact of dumped imports "on the domestic industry" under Article 3.4. And Article 3.5 requires an analysis of the causal relationship between dumped imports and injury "to the domestic industry." Thus, an authority should exercise care in ensuring that its definition of the domestic industry does not distort the injury determination.

23. In some cases, an authority's decision to collect and assess evidence <u>before</u> defining the domestic industry may be relevant in determining whether the authority complied with Article 3.1. A panel should determine whether, when taken together with other facts, this sequencing would support a finding that the authority's determination in this respect was not "objective."

24. But unlike the Panel and the EU, the United States is not persuaded that collecting and reviewing data before defining the domestic industry is *per se* contrary to Article 3.1 or that such an approach inherently gives rise to a risk of material distortion.[32] For instance, an

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[29] *See, e.g.*, AD Agreement, Art. 5.7 (evidence of both dumping and injury "shall be considered simultaneously" in the decision to initiate an investigation and thereafter, during the course of the investigation, starting on a date not later than the earliest date on which provisional measures may be applied), Art. 5.8 (application shall be rejected and an investigation "shall be terminated promptly as soon as the authorities concerned are satisfied" that the evidence does not justify continuing with the case, and there shall be "immediate termination" in cases where the margin is *de minimis*), Art. 5.10 (except in special circumstances, investigations shall be "concluded within one year, and in no case more than 18 months, after their initiation"), Art. 6.1.1 ("[e]xporters or foreign producers receiving questionnaires used in an anti-dumping investigation shall be given at least 30 days for reply), Art. 6.9 (before making a final determination, authorities must inform all interested parties of the essential facts under consideration; such disclosure should take place "in sufficient time for the parties to defend their interests").

[30] *US – Hot-Rolled Steel (AB)*, para. 192 (quoting *Thailand –H-Beams (AB)*, paras. 137, 138).

[31] *EC – Fasteners (China) (AB)*, para. 414.

[32] Panel Report, paras. 7.15, 7.21; EU Appellee Submission, paras. 81-85. The EU recognizes that "Article 4.1 does not address explicitly when the domestic industry must be defined," but asserts that "logically that occurs

authority may need to collect and review evidence to define what constitutes the "like product" and assess whether there are related parties – steps that ordinarily precede the definition of the domestic industry. Such a sequence of events would not necessarily give rise to a risk of material distortion.

25. Likewise, an authority may "redefine" the domestic industry after collecting and analyzing evidence, without running afoul of Articles 4.1 or 3.1.[33] The text of Articles 4.1 and 3.1 does not suggest that the domestic industry may only be defined at a particular point in the investigation, without the possibility of future revision. For instance, it may be appropriate to narrow or broaden the original definition if, after gathering evidence, an authority modifies the scope of the investigated product; this could, in turn, affect the definition of the domestic industry. A redefinition of this sort would not necessarily give rise to a risk of materially distorting the injury determination. Whether or not an attempt to "redefine" the domestic industry complies with Articles 4.1 and 3.1 would depend on the facts and circumstances of a given case.

## III. THE PANEL'S ANALYSIS UNDER ARTICLE 3.2 OF THE AD AGREEMENT

26. The Panel found that the DIMD acted inconsistently with Articles 3.2 and 3.1 of the AD Agreement by failing to take into account the impact of the financial crisis in determining the appropriate rate of return in its consideration of price suppression.[34] As the Panel observed, where an authority conducts its price suppression analysis on the basis of a hypothetical target price, "an investigating authority must use a rate of return that is objective and that is based on positive evidence. Such a rate of return would take into account the particular circumstances of the industry and market at issue in the investigation."[35] On the facts presented, the Panel suggested that the financial crisis "bring[s] into question" the appropriateness of the rate of return selected by the DIMD, and that an objective investigating authority "may not ignore such evidence."[36]

27. Russia appeals these findings, arguing that Article 3.2 of the AD Agreement does not require the consideration of any particular factor.[37] According to Russia, a focus on factors such as the financial crisis could result in a biased analysis.[38] In any event, Russia argues that

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before seeing the Questionnaire Responses." *Id.*, para. 84. The United States does not see anything in the text or logic of Articles 4.1 or 3.1 that would require drawing such a definitive temporal line. The EU asserts – apparently in the alternative – that "the limit in time stems from the moment that a risk of material distortion arises in a particular investigation." *Id.* As noted above, the United States does not see Article 3.1 as imposing a "limit in time."

[33] The Panel refrained from offering a "definitive finding in respect of the possibility or modalities of 'redefinition' of domestic industry under Article 4.1 . . . ." Panel Report, para. 7.26. But the Panel found, *inter alia*, that "[n]othing in Article 4.1 justifies the use of data problems of the kind identified by the Russian Federation as the basis for redefinition." *Id.*, para. 7.26(a).

[34] Panel Report, paras. 7.58-7.67.

[35] Panel Report, para. 7.61.

[36] Panel Report, para. 7.64; *see also id.*, para. 7.66.

[37] Russia Appellant Submission, paras. 70-76, 86-88.

[38] Russia Appellant Submission, paras. 70-76, 86-88.

the financial crisis would be relevant to the causation analysis under Article 3.5 – and not to a price effects analysis under Article 3.2.[39]

28. The United States takes no position on the factual issues raised in Russia's appeal, but offers the following observations on certain issues of legal interpretation concerning Articles 3.2 and 3.1.

29. First, the United States agrees with the Panel that Article 3.2 must be considered in conjunction with the overarching obligations of Article 3.1.[40] 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 the following:

> [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 possible inquiries with regard to the effects of dumped imports on prices: price undercutting, price depression, and price suppression.[41]

30. 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 *China – 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.[42] But the fact that no definitive determination is required "does not diminish the scope of *what* the investigating authority is required to consider."[43]

31. The nature of the "consideration" contemplated in Article 3.2 is informed by Article 3.1 of the AD Agreement. Article 3.1 provides important context for Article 3.2 and serves to frame the level of scrutiny and analysis required of an authority to meet the obligation to "consider" the price effects of dumped imports. Article 3.1 imposes two requirements on authorities in reaching an injury determination: the determination must be based on "positive evidence," and it must involve an "objective examination" of the volume of the dumped imports, their price effects, and their impact on the domestic industry. The plain text of Article 3.1 makes clear that these obligations extend to an authority's price effects analysis.[44]

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[39] Russia Appellant Submission, paras. 77-85.
[40] Panel Report, paras. 7.57, 7.61.
[41] *See China – HP-SSST (Japan) / China – HP-SSST (EU) (AB)*, para. 5.155.
[42] *China – GOES (AB)*, para. 130 (emphasis in original).
[43] *China – GOES (AB)*, para. 131 (emphasis in original).
[44] *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.'").

32. Article 3.1 states that one element of a determination of injury is the effect of dumped imports on price in the domestic market. Thus, an authority's finding on volume and price effects has broad significance, and may contribute to the ultimate determination of injury. For that reason, the authority must provide an evidentiary basis for its finding on volume and price effects. In addressing one investigating authority's price suppression findings, the Appellate Body explained that the inquiry must provide the authority with a "meaningful understanding of whether subject imports have explanatory force"[45] for price suppression, and, as dictated by Article 3.1, that understanding must be based on positive evidence and an objective examination.

33. Second, the United States agrees with Russia's observation that Article 3.2 of the AD Agreement does not prescribe a particular methodology or set of factors that must apply in a price effects analysis.[46] As discussed above, the Appellate Body has found that Article 3 "does not prescribe a specific methodology" for conducting an injury analysis.[47] This observation is persuasive, and applies equally to a price effects analysis under Article 3.2.

34. With respect to price suppression, Article 3.2 requires that an authority consider whether the effect of dumped imports is to "prevent price increases, which otherwise would have occurred, to a significant degree." As the Panel found, Article 3.2 "does not provide any guidance on how such a counterfactual consideration should be conducted."[48] The Panel recognized that, subject to the requirements of Article 3.1, an authority has "a degree of discretion" in conducting a price suppression analysis.[49]

35. Thus, authorities may employ a variety of different approaches. For instance, the Appellate Body has found that it is permissible for authorities to adopt either a "unitary" or "two-step" methodology with respect to price suppression (although it has registered a preference for the former).[50]

36. In this respect, the Panel erred when it stated that, in conducting a price suppression analysis, "an investigating authority must consider hypothetical domestic prices that would have occurred if dumped imports had not taken place."[51] The EU appears to endorse the Panel's statement.[52]

37. In some cases, construction of a hypothetical target price may be a useful analytic tool. But the text of Articles 3.2 and 3.1 does not suggest that authorities are required to construct such hypothetical prices in every case. For instance, authorities may find price effects based on data demonstrating that there has been a "cost-price squeeze" – i.e., due to subject import

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[45] *China – GOES (AB)*, para. 144.
[46] Russia Appellant Submission, para. 73.
[47] *China – HP-SSST (Japan) / China – HP-SSST (EU) (AB)*, para. 5.141.
[48] Panel Report, para. 7.61.
[49] Panel Report, para. 7.61.
[50] *China – GOES (AB)*, para. 142.
[51] Panel Report, para. 7.61 (emphasis supplied).
[52] EU Appellee Submission, para. 114 ("[W]hen examining [ ] the price effects under Article 3.2, the investigating authority is first constructing [target] domestic prices, and thus determining what the prices would reasonably have been in the absence of dumped imports.").

pricing, producers are unable to raise prices sufficiently to cover rising costs.[53] Such an approach need not involve the quantification of a hypothetical target price.

38. Nonetheless, in carrying out its price effects analysis, an authority "is focused on the relationship between subject imports and domestic prices, and the authority may not disregard evidence that calls into question the explanatory force of the former for significant depression or suppression of the latter."[54]

39. Third, contrary to Russia's argument, the United States does not view the Panel as having conflated the price effects analysis under Article 3.2 with the causation inquiry under Article 3.5.[55] According to Russia, an event such as the financial crisis is relevant only to the causation inquiry under Article 3.5, and is "not to be considered in the price suppression analysis."[56] But while a panel need not make a determination of causation in the context of Article 3.2, a panel may nonetheless find it necessary to consider some of the same facts in its analysis under Article 3.2 as it does under Article 3.5.

40. In conducting its determination under Article 3, an authority may find that certain facts or events are relevant at multiple stages of the injury analysis. If a fact has relevance to a causation analysis under Article 3.5, it also may be relevant – albeit in a potentially different way – to the intermediate steps in the injury analysis, such as price suppression. This does not necessarily imply a conflation of the inquiries under Articles 3.2 and 3.5.

41. In *China – GOES*, the Appellate Body addressed the relationship between Articles 3.2 and 3.5, and came to a similar conclusion. The Appellate Body found that these provisions "posit different inquiries," but that both include an examination of price effects:

> The analysis pursuant to Article[ ] 3.5 . . . concerns the causal relationship between *subject imports* and *injury* to the domestic industry. In contrast, the analysis under Article[ ] 3.2 . . . concerns the relationship between subject imports and a different variable, that is, *domestic prices*. . . . Thus, the examination under Article[ ] 3.5 . . encompasses "all relevant evidence" before the authority, including the volume of subject imports and their price effects listed under Article[ ] 3.2 . . . . The examination under Article[ ] 3.5 . . ., by definition, covers a broader scope than the scope of the elements considered in relation to price depression and suppression under Article[ ] 3.2 . . . .[57]

42. The price effects inquiry under Article 3.2 is thus a key building block in the overall injury determination. As the Appellate Body explained in *China – GOES*, the Article 3.2 analysis is "necessary in order to answer the ultimate question in Article[ ] 3.5 . . . as to whether

[53] *See, e.g.*, *US – Tyres (China) (AB)*, paras. 242-245 (upholding authority's assessment of "cost-price squeeze" in safeguards case under protocol of accession); *China – GOES (Panel)*, para. 7.546 (upholding authority's reliance on changes in the price-cost ratio to find price suppression).
[54] *China – GOES (AB)*, para. 154.
[55] Russia Appellant Submission, paras. 81-86.
[56] Russia Appellant Submission, para. 85.
[57] *China – GOES (AB)*, para. 147.

subject imports are causing injury to the domestic industry."[58] Thus, the price effects inquiry under Article 3.2 "*contributes to*, rather than duplicates, the overall determination required under Article[ ] 3.5 . . . ."[59] The United States agrees with these statements of the Appellate Body.

## IV. THE PANEL'S ANALYSIS UNDER ARTICLE 3.4 OF THE AD AGREEMENT

43. The Panel found that the DIMD did not act inconsistently with Articles 3.1 and 3.4 of the AD Agreement by not considering the inventories of product held by a dealer that is related to the domestic producer, Sollers.[60] The Panel found that "nothing in Article 3.4 . . . suggests to us that an investigating authority is generally required to consider the inventories of a dealer related to a domestic producer, but not itself a producer of the like product . . . ."[61]

44. The Panel explained that it "do[es] not exclude the possibility that in certain circumstances, evidence pertaining to such a related trader may constitute evidence pertaining to 'a relevant economic factor[ ]' having a bearing on the state of the industry."[62] But this would have to be demonstrated based on the facts of a particular case, and the authority must be satisfied that such evidence "relates to the domestic industry."[63]

45. On appeal, the EU criticizes the Panel for adopting an approach that is "unduly narrow and formalistic."[64] The EU argues that, to make an objective assessment based on positive evidence, an authority must conduct an "assessment of the relevant factors [that] relate to the entire single economic entity."[65] According to the EU, the Panel's interpretation of the word "inventories" in Article 3.4 would be "limited to the formal boundaries of the inventories of the producer at its premise [*sic.*]."[66] This, in turn, would allow entities to "manipulate the relevant data by simply shifting goods from one warehouse to another or even to simply shift the ownership of the goods in the companies' books at will."[67]

46. The United States does not comment on the Panel's factual findings, but offers the following views on certain issues of legal interpretation concerning Article 3.4.

47. First, the inquiry under Article 3.4 is not limited to an evaluation of factors such as "inventories" that are expressly enumerated. Article 3.4 of the AD Agreement specifies an authority's obligation to ascertain the impact of dumped imports on the domestic industry. The article mandates 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." The text of Article 3.4 confirms that the

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[58] *China – GOES (AB)*, para. 149.
[59] *China – GOES (AB)*, para. 149 (emphasis in original).
[60] Panel Report, paras. 7.122-7.123.
[61] Panel Report, para. 7.122.
[62] Panel Report, para. 7.122.
[63] Panel Report, para. 7.122.
[64] EU Other Appellant Submission, para. 172.
[65] EU Other Appellant Submission, para. 173.
[66] EU Other Appellant Submission, para. 177.
[67] EU Other Appellant Submission, para. 178.

"industry" in question is "the domestic industry," which is to be interpreted in accordance with Article 4.1. Article 3.4 then lists a series of factors that must be evaluated – including the "actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments."

48. As the text of Article 3.4 confirms, the list of enumerated factors in Article 3.4 is "not exhaustive," and no one factor is necessarily "decisive." The listed factors are "deemed to be relevant in every investigation and . . . must always be evaluated by the investigating authorities."[68] But additional factors also may be "relevant," depending on the facts of a given case.

49. Thus, the United States agrees with the Panel, that in an appropriate case, an authority may need to consider such additional factors in its analysis under Article 3.4.[69] Such factors could include information – such as information relating to inventories – pertaining to entities that are related to producers within the domestic industry.[70] The relevance of this information would depend on the facts of a given case, and the extent to which the information "ha[s] a bearing on the state of the industry."[71]

50. Second, the manner in which an authority chooses to articulate the "evaluation" of these economic factors may vary. 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.[72] Consistent with Article 3.1, the authority must conduct its examination of the impact on the domestic industry – an examination that necessarily includes an evaluation of all relevant economic factors – based on positive evidence and an objective examination.

51. Third, it is not sufficient for an authority merely to evaluate the state of the domestic industry. Article 3.4 requires an "examination" of the impact of the dumped imports on the domestic industry. The text of Article 3.4 of the AD Agreement expressly requires investigating authorities to examine the "impact" of subject imports on a domestic industry, and not just the state of the industry.

52. Thus, in examining "the relationship between subject imports and the state of the domestic industry"[73] pursuant to Article 3.4 of the AD Agreement, an authority must consider whether changes in the state of the industry are the consequence 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."[74]

[68] *US – Hot-Rolled Steel (AB)*, para. 194.
[69] Panel Report, paras. 7.122-7.123.
[70] Panel Report, para. 7.122.
[71] AD Agreement, Art. 3.4.
[72] *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.*, paras. 119 and 133.
[73] *China – GOES (AB)*, para. 149.
[74] *Thailand – H-Beams (Panel)*, para. 7.236.

## V. THE PANEL'S ANALYSIS UNDER ARTICLE 6.9 OF THE AD AGREEMENT

53. The United States comments on two aspects of the Panel Report challenged by the parties on appeal regarding Article 6.9 of the AD Agreement: (a) the Panel's finding that the source of data used by an investigating authority is not itself an "essential fact under consideration" within the meaning of Article 6.9; and (b) the Panel's finding of a breach of Article 6.9 of the AD Agreement based on the failure to disclose information that was not properly treated as confidential under Article 6.5 of the AD Agreement.

### A. The Panel Erred In Its Analysis Of Whether A Source of Data Constitutes An "Essential Fact Under Consideration"

54. The Panel found that the source of certain data used by the DIMD did not fall within the disclosure obligation of Article 6.9 of the AD Agreement.[75] For the Panel, "[n]ot every 'essential fact' is required to be disclosed. Article 6.9 requires the disclosure of 'essential facts under consideration.'"[76] According to the Panel, "[i]n itself, the source of data is not an essential fact under consideration. Knowledge of the sources of data might be useful to establish the credibility of information used by investigating authorities, but the sources of data are not themselves essential facts under consideration."[77]

55. In its appeal, the EU argues that the Panel incorrectly interpreted and applied Article 6.9.[78] According to the EU, the Panel incorrectly treated "essential facts" and "facts under consideration" as "two wholly separate and cumulative criteria" for the application of Article 6.9.[79] The EU also criticizes the Panel for finding that the source of data is not itself an "essential fact under consideration," and thus falls outside the scope of Article 6.9.[80]

56. As previously stated, the United States does not take a position on the Panel's factual findings. However, the United States agrees with the EU that the Panel erred in its interpretation of Article 6.9.

57. First, the Panel's apparent attempt to distinguish "essential facts" from "essential facts under consideration" misconstrues the nature of the inquiry under Article 6.9. Article 6.9 provides that:

> [A]uthorities shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests.

[75] Panel Report, para. 7.257.
[76] Panel Report, para. 7.256(c) (emphasis in original).
[77] Panel Report, para. 7.257(a) (emphasis in original).
[78] EU Other Appellant Submission, paras. 180-203.
[79] EU Other Appellant Submission, paras. 193-194.
[80] EU Other Appellant Submission, paras. 195-203.

58. Turning to the first sentence of Article 6.9, the term "essential" qualifies the term "facts," and implies that a subset of the facts before the investigating authority needs to be disclosed under Article 6.9. The Appellate Body has found that the term "essential" in Article 6.9 "carries a connotation of significant, important, or salient."[81]

59. The term "essential facts" must be read in context with the remainder of Article 6.9. In particular, the phrase "under consideration" refers to "those facts on the record that may be taken into account by an authority in reaching a decision as to whether or not to apply definitive anti-dumping . . . duties."[82] Article 6.9 further specifies that the disclosure obligation applies to essential facts under consideration that "form the basis for the decision whether to apply definitive measures." And the second sentence of Article 6.9 clarifies that disclosure "should take place in sufficient time for the parties to defend their interests," providing an important element of procedural fairness for the parties.

60. Based on this context, the Appellate Body has interpreted Article 6.9 as follows:

> [W]e understand the 'essential facts' to refer to those facts that are significant in the process of reaching a decision as to whether or not to apply definitive measures. Such facts are those that are salient for a decision to apply definitive measures, as well as those that are salient for a contrary outcome. An authority must disclose such facts, in a coherent way, so as to permit an interested party to understand the basis for the decision whether or not to apply definitive measures. In our view, disclosing the essential facts under consideration pursuant to Article[ ] 6.9 . . . is paramount for ensuring the ability of the parties concerned to defend their interests.[83]

61. As the preceding suggests, the term "essential facts under consideration" is properly understood in relation to the other terms in Article 6.9. Contrary to the Panel's finding,[84] the "essential facts under consideration" should not be understood as a subset of the total "essential facts" before the authority. A fact is not "essential" in the abstract. It is "essential" only by reference to the purpose set out in Article 6.9 – i.e., it forms the basis for a decision and ensures the ability of the parties to defend their interests.[85]

62. Second, the Panel erred in finding that a source of data cannot constitute an "essential fact" for purposes of Article 6.9.

63. The assessment of what qualifies for disclosure depends on the facts of a given case. As the Appellate Body has explained, the identification of what constitutes an "essential fact" "depends on the nature and scope of the particular substantive obligations, the content of the particular findings needed to satisfy the substantive obligations at issue, and the factual

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[81] *China – GOES (AB)*, para. 240.
[82] *China – GOES (AB)*, para. 240.
[83] *China – GOES (AB)*, para. 240.
[84] Panel Report, para. 7.256(c).
[85] *See China – GOES (AB)*, para. 240.

circumstances of each case, including the arguments and evidence submitted by the interested parties."[86]

64. The panel's analysis in *China – Broiler Products* provide further guidance regarding "essential facts" that must be disclosed to interested parties in the context of dumping calculations. In that dispute, the panel stated that, under Article 6.9, "the 'essential facts' underlying the findings and conclusions relating to [dumping, injury, and a causal link]…must be disclosed."[87] As to the determination of the existence and margin of dumping specifically, the panel reasoned that the investigating authority must disclose data used in: (1) the determination of normal value (including constructed value); (2) the determination of export price; (3) the sales that were used in the comparison between normal value and export prices; (4) any adjustments for differences which affect price comparability; and (5) the formulas that were applied to the data.[88]

65. Without a full disclosure of the essential facts under consideration, it would not be possible for a party to identify mathematical or clerical errors or even whether the investigating authority actually collected probative evidence. Such failure to provide this information may result in an interested party being unable to defend its interests because it could not identify in the first instance the particular issues that are adverse to its interests.[89]

66. In a given case, the source of data may be an important fact that a party needs to defend its interests. It may be necessary to understand the source of data to understand the basis for the authority's decision. Moreover, a party may be able to point out mathematical or clerical errors if it knows the source of data that an authority relies upon. And if a party has reason to doubt the accuracy of a particular source relied on in a determination, it may raise this with the authority. Therefore, in the view of the United States, Article 6.9 does not exclude *a priori* the possibility that a source of data could qualify as an "essential fact" requiring disclosure.

### B. Inconsistency With Article 6.5 Of The AD Agreement Does Not Necessarily Result In Inconsistency With Article 6.9

67. In its report, the Panel rejected Russia's defense that certain non-disclosed "essential facts" were confidential. For the Panel, Article 6.5 "is not a carve-out to Article 6.9: confidentiality of information is neither an absolute bar to disclosure nor a defence to the failure to disclose as required under Article 6.9."[90] Under a "harmonious interpretation" of Articles 6.5 and 6.9, if an authority properly treats essential facts as confidential, the investigating authority could meet its obligations under Article 6.9 through the use of non-confidential summaries.[91] The Panel found that the DIMD did not properly treat the relevant information as confidential, because a showing of "good cause" was not met, as required under Article 6.5.[92] The Panel

[86] *China – HP-SSST (Japan) / China – HP-SSST (EU) (AB)*, para. 5.130.
[87] *China – Broiler Products*, para. 7.86.
[88] *China – Broiler Products*, para. 7.93.
[89] *See China – HP-SSST (Japan) / China – UP-SSST (EU) (AB)*, para. 5.131 & n.323.
[90] Panel Report, para. 7.268.
[91] Panel Report, paras. 7.249(d), 7.268.
[92] Panel Report, para. 7.269.

found that "[t]o the extent that the DIMD failed to disclose information that was not properly treated as confidential [ ], it acted inconsistently with Article 6.9."[93]

68. On appeal, Russia characterizes the Panel as having found that a breach of Article 6.5 "automatically" results in a breach of Article 6.9.[94] According to Russia, the treatment of confidential information under Article 6.5 is a "distinct legal question" from the essential facts inquiry under Article 6.9.[95]

69. The United States takes no position on the merits of the Panel's factual findings or the factual assertions made by Russia, but instead focuses its comments on certain issues of legal interpretation.

70. As an initial matter, the United States agrees with the EU that the relevant discussion in the Panel Report need not be read in the manner suggested by Russia.[96] It is not apparent to the United States that the Panel viewed a breach of Article 6.5 as "automatically" triggering a breach of Article 6.9.

71. Nonetheless, the United States agrees with Russia that Articles 6.5 and 6.9 are distinct obligations.[97] A breach of Article 6.5 does not necessarily result in a consequential breach of Article 6.9.

72. Article 6 of the AD Agreement balances the protection of confidential information with the right of parties to be given a full and fair opportunity to see relevant information and defend their interests.[98] The United States considers that Article 6.5 requires that investigating authorities ensure the confidential treatment of information. Article 6.5.1 then balances the need to protect confidential information against the disclosure requirements of other Article 6 provisions by requiring that, if an investigating authority accepts confidential information, it shall require that confidential information is summarized in sufficient detail to permit a reasonable understanding of the substance of the information. Furthermore, footnote 17 of the AD Agreement contemplates one mechanism by which authorities can balance these competing interests, which is through a narrowly-drawn protective order.[99]

73. By contrast, Article 6.9 imposes a disclosure obligation, and requires authorities to "inform all interested parties of the essential facts under consideration, which form the basis for the decision whether to apply definitive measures." This disclosure must occur "before a final determination is made," and "should take place in sufficient time for the parties to defend their interests."

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[93] Panel Report, para. 7.270.
[94] Russia Appellant Submission, para. 95.
[95] Russia Appellant Submission, para. 95.
[96] Panel Report, paras. 7.268-7.270; EU Appellee Submission, paras. 145, 151.
[97] Russia Appellant Submission, para. 95.
[98] *See, e.g.,* AD Agreement, Art. 6.2, first sentence ("Throughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests."); Art. 6.9, second sentence ("Such disclosure should take place in sufficient time for the parties to defend their interests.").
[99] AD Agreement, footnote 17 ("Members are aware that in the territory of certain Members disclosure pursuant to a narrowly-drawn protective order may be required.").

74. Thus, Articles 6.5 and 6.9 have a different scope of application, such that a failure to comply with the requirements of Article 6.5 need not always trigger a breach of Article 6.9. The particular "information" that is improperly treated as confidential may be an "essential fact," depending on the circumstances of a given case. But this will not always be so. Where "information" does not qualify as an "essential fact," the improper treatment of this information as confidential may give rise to a breach of Article 6.5. But the resulting failure to allow other parties access to this information would not give rise to a breach of Article 6.9.

## VI. CONCLUSION

75. 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.