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

(DS479)

THIRD PARTY ORAL STATEMENT
OF THE UNITED STATES OF AMERICA

March 10, 2016

I. INTRODUCTION

Mr. Chairperson, Members of the Panel:

1. The United States appreciates the opportunity to appear before you today and provide the U.S. views as a third party in this dispute. In our written submission, we addressed certain issues of systemic concern regarding the interpretation and application of the AD Agreement[1].

2. Today, the United States will focus its comments on a subset of the issues discussed in the U.S. third party submission. Specifically, we will address the EU's claims on defining the domestic industry, price effects, designation of confidential information, and disclosure of essential facts.

II. THE EUROPEAN UNION'S CLAIMS REGARDING ARTICLES 3.1 AND 4.1 OF THE AD AGREEMENT

3. The United States will first address the EU's claim that a definition of the domestic industry that excludes a domestic producer is inconsistent with Articles 3.1 and 4.1 of the AD Agreement. The United States observes that, as a general matter, the EU and Russia both appear to recognize the relevance to the inquiry of Article 3.1. The parties in this proceeding have offered different views on precisely how the obligations of Article 3.1 inform the analysis of the domestic industry under Article 4.1. We will address this narrow issue.

4. Article 4.1 of the AD Agreement defines the "domestic industry" as referring to the industry as a whole, or those producers whose production constitutes a "major proportion" of the total domestic production. For the purpose of our comments today, we focus on the latter situation, where an authority seeks to define the domestic industry as a "major proportion" of

[1] *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* ("AD Agreement").

domestic production. Under such circumstances, the "major proportion" requirement is to be read in conjunction with the overarching obligation of Article 3.1. That provision requires that a final material injury determination be based on "positive evidence" and an "objective examination" of the facts. To result in such a determination, the authority's definition of the domestic industry must be unbiased so as not to give rise to a material risk of distortion.

5. An investigating authority's need to define the domestic industry is a critical early step to the injury analysis. The definition of the domestic industry affects several of the intermediate conclusions that flow into the final determination. An authority is to analyze the impact of dumped imports "on *the domestic industry*," pursuant to Article 3.4. Article 3.5 requires an analysis of the causal relationship between dumped imports and injury "to *the domestic industry*." Thus, a definition of the domestic industry that introduces a material risk of distortion may have broad repercussions on the injury determination and subsequent impact and causation analyses.

6. The Appellate Body has opined that the "major proportion" obligation of Article 4.1 has both quantitative and qualitative connotations.[2] The Appellate Body has suggested an inverse relationship between the proportion of producers represented in the domestic industry and the absence of a risk of material distortion.[3] In their written submissions, the parties appear to suggest that to include a sufficiently high proportion of producers in the definition of domestic industry could insulate an authority from the obligations of Article 3.1.[4]

---

[2] *EC – Fasteners (China) (Article 21-.5 – China)* (AB), para. 5.302.
[3] *EC – Fasteners (China) (Article 21-.5 – China)* (AB), para. 5.302.
[4] Russia's First Written Submission, para. 70; EU's First Written Submission, para. 41.

7. The United States does not take issue with the concept of an inverse relationship; to consider the issue in this manner can be a helpful analytical tool. But, the United States stresses that Article 3.1 stands on its own. The conceptual framework articulated by the Appellate Body cannot be used to excuse an authority from its obligation to define the domestic industry in a manner that is unbiased and does not favor the interests of one party over another.

8. Article 3.1 of the AD Agreement imposes certain obligations on an authority that inform but are distinct from the obligations of Article 4.1. A definition of the domestic industry that captures 99% of the domestic production of the subject merchandise may meet the "major proportion" requirement of Article 4.1, but that conclusion does not necessarily ensure the analysis conforms to the obligation under Article 3.1. Ultimately, for a material injury determination to be based on "positive evidence and involve an objective examination," consistent with Article 3.1, the authority must rely upon a properly defined domestic industry to perform the injury analysis.

9. For this reason, an authority must take care to define the domestic industry in a manner that satisfies the "major proportion" requirement of Article 4.1 *and* Article 3.1's obligation that the definition be unbiased and objective so as not to give rise to a material risk of distortion.

III. THE EUROPEAN UNION'S CLAIMS REGARDING ARTICLES 3.1 AND 3.2 OF THE AD AGREEMENT

10. The United States will next address a narrow aspect of the legal obligation found in Article 3.2 of the AD Agreement. Article 3.2 concerns an authority's volume and price effects determination and identifies three inquiries with regard to the effects of dumped imports on price effects: price undercutting, price depression, and price suppression. The article requires an

investigating authority to "consider" the volume and price effects of dumped imports. The parties differ on their interpretation of this obligation, and the United States would offer the following comments.

11. The AD Agreement does not define how an authority is to "consider" the volume and price effects of the relevant imports. The United States refers to Article 3.1 of the AD Agreement to discern the analytical rigor required by the obligation to "consider." In reaching an injury determination, Article 3.1 requires that the determination be based on "positive evidence" and 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.[5]

12. 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. The price effects analysis of Article 3.2 is one of the building blocks of the investigating authority's ultimate determination of injury and is explicitly referenced in Article 3.5. As an element of the injury determination, the price effects analysis necessarily must itself be based on positive evidence and involve an objective examination. The Appellate Body has stated that the inquiry must provide the authority with a "meaningful understanding of whether subject imports have explanatory force"[6] for price effects.

[5] *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.'").

[6] *China – GOES* (AB), para. 144.

13. The United States submits that the requirement "to consider" price effects in Article 3.2, read in the context of Article 3.1, requires an authority to identify an evidentiary basis for a finding on price effects and conduct an examination that provides a meaningful understanding of those effects. The text does not require an authority to make a definitive determination on price effects, but a passive recitation of the facts will not suffice. The context of Article 3.1, and the primary role of the price effects analysis in the injury determination, dictate that an authority is to articulate a finding of price effects that is based on positive evidence and an objective examination.

IV. ARTICLES 6.5 AND 6.5.1 OF THE AD AGREEMENT REQUIRE PROTECTION OF CONFIDENTIAL INFORMATION AND PROVISION OF PUBLIC SUMMARIES

14. We now turn to the issue of confidential treatment of information. While the United States takes no position on the accuracy of the factual allegations made by both parties, the United States will highlight the relevant legal obligations.

15. According to Article 6.5 of the AD Agreement, information that is "by nature" confidential or that is "provided on a confidential basis" shall, upon "good cause" shown, be treated as such by the investigating authorities.[7] In particular, in *EC – Fasteners (China)*, the Appellate Body stated that an investigating authority "must objectively assess the 'good cause' alleged for confidential treatment, and scrutinize the party's showing in order to determine whether the submitting party has sufficiently substantiated its request".[8] Where the information is "by nature" confidential, the "good cause" for the confidential treatment may be self-evident.

[7] *EC – Fasteners (China)* (AB), para. 530.
[8] *Id*. at para. 539.

However, the requirement to show good cause rests on the interested party submitting the information, not the investigating authority.[9]

16. Provided good cause has been shown by the interested party, Article 6.5.1 of the AD Agreement requires that non-confidential summaries of confidential information be provided in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence.[10] Article 6.5.1 establishes an alternative method for communicating confidential information so as to satisfy the right of other parties to the investigation to obtain a reasonable understanding of the substance of the confidential information, and to defend their interests.[11] If an interested party cannot adequately summarize the confidential information, an explanation of why the information was not susceptible to summarization must be provided to the investigating authorities.[12]

17. Based on the obligations outlined in Article 6, the Panel should first determine if the investigating authority appropriately treated information as confidential. Then, the Panel should determine whether an investigating authority that accepted confidential information ensured that a summary of that confidential information was provided to other parties in sufficient detail to permit a reasonable understanding of the substance of the information.

V. ARTICLE 6.9 OF THE AD AGREEMENT REQUIRES DISCLOSURE OF ESSENTIAL FACTS

18. Finally, we would like to address the alleged failure of Russia to disclose essential facts under Article 6.9 of the AD Agreement.

---

[9] *Id*.
[10] *Id*. at paras. 541-542. *See also China – Broiler Products*, para. 7.50.
[11] *China – Broiler Products*, para. 7.321.
[12] *EC – Fasteners* (AB), para. 544.

19. Article 6.9 of the AD Agreement requires the investigating authority to disclose to interested parties the "essential facts" forming the basis of the investigating authority's decision to apply anti-dumping duties.[13] The data and calculations relied on by an investigating authority to determine the normal value and export prices, as well as the adjustments to the calculations constitute "essential facts" forming the basis of the investigating authority's imposition of final measures within the meaning of Article 6.9.[14]

20. The second sentence of Article 6.9 also makes clear that the aim of disclosure is "to permit parties to defend their interests." To this end, the panel in *China – Broiler Products* reasoned that the investigating authority must disclose the following determinations and related data: (i) the determination of normal value (including constructed normal value); (ii) the determination of export price; (iii) the sales that were used in the comparisons between normal value and export price; (iv) any adjustments for differences which affect price comparability; and (v) the formulas that were applied to the data.[15]

21. If the interested parties are not provided access to these facts used by the investigating authority on a timely basis, it would be impossible for a party to identify whether the determinations contain clerical or mathematical errors, or even whether the investigating authority actually did what it purported to do.[16] Such failure to provide this information would result in an interested party being unable to defend its interests.[17]

22. With respect to what constitutes an essential fact for an injury analysis, the Appellate Body report in *China – GOES* provides useful guidance. The Appellate Body observed that what

[13] *China – Broiler Products*, para. 7.86.
[14] *Id.* at para. 7.89.
[15] *China – Broiler Products*, para. 7.93.
[16] *Id.* at para. 7.91.
[17] *Id.* at para. 7.91.

constitutes an essential fact must be understood in the light of the content of the findings needed to satisfy the substantive obligations with respect to the application of definitive measures under the relevant agreement, as well as the factual circumstances of each case.[18] Such findings rest on an analysis of various elements that an authority is required to examine, which, in the context of an injury analysis, are set out in Articles 3.1, 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement.[19] Thus, an investigating authority would need to disclose the facts necessary for it to make findings regarding price effects and causation in particular, and generally for it to conduct the injury examination that led to the decision whether or not to apply definitive measures.

23. Accordingly, the Panel should assess whether the EAEC properly disclosed essential facts so as to permit companies concerned to understand clearly the data the investigating authority used and how that data was used to determine the margin of dumping and material injury.

VI. CONCLUSION

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

[18] *China – GOES (AB)*, para. 241.
[19] *Id*.